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A TREATISE

UPON SOME OF THE

GENERAL PRINCIPLES OF THE LAW,

WHETHER OF A

LEGAL, OR OF AN EQUITABLE NATURE,

INCLUDING THEIR

RELATIONS AND APPLICATION

TO

ACTIONS AND DEFENSES

IN GENERAL,

WHETHER IN

COURTS OF COMMON LAW, OR COURTS OF EQUITY;

AND EQUALLY ADAPTED TO

COURTS GOVERNED BY CODES.

By WILLIAM WAIT,

COUNSELOR AT LAW.

VOLUME III.

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CHAPTER LX.

EJECTMENT.

TITLE I.

GENERAL PRINCIPLES AND REQUISITES OF THE ACTION.

ARTICLE I.

NATURE, HISTORY AND DEFINITION.

Section 1. History and nature. The history of the action of ejectment is one of peculiar interest, because it exhibits, more clearly than that of any other action, the pliability of the common law, and the ingenuity of the courts in adapting it to the exigencies of the passing time, and providing remedies for new phases of wrongs previously unprovided for.

Its practical value at the present day lies principally in the explanation it affords of terms used and distinctions drawn in treatises and decisions of an earlier date, which are now nearly, if not quite, obsolete.

The ancient remedies for the recovery of the possession of lands with damages for their detention, by writ of right and writ of entry, were burdened and embarrassed by many nice technicalities and much cumbersome machinery. To obviate their defects and provide a more plain and direct remedy, and one adapted to all cases, the courts, acting under the authority of an act of Parliament of 13 Edw. I, invented the writ of ejectment. From an action nearly identical with that ordinarily used to recover damages for trespasses on lands they developed one which was comparatively simple and yet of greater efficacy than the former writs. Prior to the reign of Edward III, although a tenant for years, who had been ousted from his possession by his lessor, might recover it back by an action on the covenants of his lease, together with damages for the breach, yet he had no remedy for an ouster by a stranger claiming by title paramount, or by a grantee of the reversion, except a writ of *ejectione firmæ*, in which he could recover simply his damages and nothing more. In the reign of that monarch, the courts

of equity began to give relief in such cases by compelling the ejector to make specific restitution of the land to the party immediately injured, and the courts of law, following their lead, adopted that as the best method of doing complete justice between the parties. 2 Broom & Had. Com. 212–216, Wait's ed.; 3 Bl. Com. 200.

An entire new remedy, adequate to the end sought, might doubtless have been devised, but the courts chose to follow the usual course of adopting an old one. This writ of *ejectione firmæ* was, therefore, taken as the foundation; and to adapt it to all cases in which the rightful owner or person entitled to possession was deprived thereof, and make it adequate to the trial of titles to the freehold, they resorted to certain legal fictions. The person in whose name the action was to be brought as lessee of the premises sought to be recovered, if not so in fact, was for the purposes of the suit made so; the claimant making a formal entry in his company, and delivering to him a lease and possession under it. He then brought his action either against the tenant in actual possession, or against some one in possession who happened upon the land, called a *casual ejector*, giving notice to such tenant. To sustain the action in this form it was necessary to establish title in the plaintiff's lessor, a lease from him, entry and ouster. An actual entry and delivery of a lease being found to be in some cases impracticable, and in all cases attended by unnecessary formality and trouble, another legal fiction was invented and pressed into service by Chief Justice Rolle, about the year 1656, by which the action was to be commenced in the name of John Doe, a fictitious person, on demise of the person claiming title, against Richard Roe, another fictitious person, as *casual ejector*, and the real person in possession was required to be notified, and was to be permitted to come in and defend only on condition that he should sign a *consent rule*, by which he should admit lease, entry and ouster. Thenceforth the action proceeded as one between the real parties, to determine their respective titles in the premises, and being more simple than any other form of action having that object in view, it soon became the principal remedy for the trial of titles to real estate.

In this form it was introduced into the American colonies as a part of the common law, but it has undergone various modifications in the different States of the Union. Even in its native country it has been greatly changed, the Common Law Procedure Act of 1852 divesting it of its cumbrous features, and providing almost a new form of action, which produces the same results by a simple and intelligible process. Tyler on Eject. 600; 2 Broom & Had. Com. 214–216, Wait's ed.; id. 211, note 566. And, for the purpose of understanding the present state of

the English law upon this subject, an examination of the recent English statutes is indispensable.

A few of the United States still retain the action in substantially its old form.

Of those which retain the name of ejectment, the majority have so modified the action as to make it a simple and direct action for the trial of the title and right of possession; and in those which have adopted codes and abolished all the old forms and names of actions, it is simply a civil action, or has a title descriptive of the end sought by it.

An action *in personam* for the recovery of damages only for a wrongful dispossession of real estate has thus been changed into one for the recovery not only of such damages, but of the possession of the premises themselves, in which the principal question to be tried is that of title.

An action of ejectment is not strictly an action for a *tort*, but is a mixed action, partly and nominally for a *tort*, but mainly to try title to land. *Lopez* v. *Downing*, 49 Ga. 120.

§ 2. **Definition and present nature.** As defined by law writers generally, ejectment is "a species of mixed action which lies to recover the possession of lands, with damages and costs for the wrongful withholding of them; being the principal method in modern use for trying titles to land." Burrill's Law Dict.; 2 Broom & Had. Com. 211, note 566, Wait's ed. This article groups together both common-law and statutory actions, which are similar in character and object, but differ in their names and in many of their peculiar features, so that a broader definition is perhaps necessary; and we will here define ejectment to be the remedy provided by law for the injury of ejection from or dispossession of land.

It is a possessory action, and as the plaintiff's right to the possession of the premises in dispute usually depends upon his title thereto, the question of title is the principal one involved. It is not only the most simple and direct, but in some of the States it is the only action in which the actual title to real estate can be tried and determined. 2 Broom & Had. Com. 211, note 566, Wait's ed.

Ejectment was originally a personal action, and by some authors is still so regarded. By others, in view of its two-fold object, it is considered a mixed action; but its principal object and use entitles it to be classed, as it now is by many of the best authors, and in some of the States by statute, among real actions.

§ 3. **Statutory provisions of the States.** As before stated, the action of ejectment was introduced into this country as part of the common

law; and in some form it is still retained by all of the States in which that law prevailed. In many of them, however, it has been greatly modified by statute, and in treating of the remedy as it now exists here, it is necessary to notice some of the provisions of those statutes. The principal modifications made thereby relate to and regulate the pleadings and practice in all actions for the recovery of real estate, but these are foreign to the purpose of this article, and need not be stated or further referred to. Others of them, however, relate to and determine the parties by and against whom the action may be brought, — the title, and the kind and amount of evidence necessary to sustain it, — the form and effect of the judgment, and the recovery of damages and mesne profits; and these fall within the scope of this work, so that it would be incomplete without a statement of the changes wrought by them. But it is not necessary to speak of them at greater length in this place, as they can and will be more appropriately and more conveniently treated under the various subdivisions into which the subject has been distributed. With this general statement, therefore, we leave them for the present.

ARTICLE II.

WHEN AND FOR WHAT PROPERTY THE ACTION LIES.

Section 1. In general. The rule of the common law, that ejectment will lie only for corporeal hereditaments, or things tangible, on which an entry can be made, or of which the sheriff can deliver possession, prevails generally in the United States. *Child* v. *Chappell*, 9 N. Y. (5 Seld.) 246; *Black* v. *Hepburne*, 2 Yeates, 331; *Den* v. *Craig*, 3 Green, 191; *Nichols* v. *Lewis*, 15 Conn. 137. In some of them the scope of the action has been extended, and in others it has been limited by statute. Thus, in New York the action will lie in the same cases in which a writ of right for the recovery of lands, tenements or hereditaments would lie. The statutes of Illinois, Michigan and Virginia are substantially the same. In Maine and Massachusetts the remedy, there termed a writ of entry, is confined to an estate of freehold, in fee simple, fee tail, for life, or for a term of years. In Pennsylvania it is an equitable as well as a legal action, and a valid equitable title will sustain it. These and other statutory changes will be noticed more particularly under their proper heads.

§ 2. **Lands, buildings, etc.** Lands, and whatever is so attached to or connected with them as to become a part thereof, come within the general definition of corporeal hereditaments, and are, therefore, recoverable in this action from a party wrongfully in possession. In Rhode

Island the action lies in every case where the defendant has wrongfully entered or wrongfully detains any tenement or estate. *McCann* v. *Rathbone*, 8 R. I. 297. But to specify more particularly, it has been decided that ejectment will lie for a house, or for a room therein so described as to be capable of identification (*White* v. *White*, 1 Harr. [N. J.] 202; *Child* v. *Chappell*, 9 N. Y. [5 Seld.] 246); but perhaps not after the same has been destroyed or so altered that it cannot be identified. *Rowan* v. *Kelsey*, 18 Barb. 484; 4 Abb. Ct. App. 125; 2 Keyes, 594. See *Woodhull* v. *Rosenthal*, 61 N. Y. (16 Sick.) 382, 389. It will lie for a stable; and even for a building erected on the land of another with his consent, under an agreement that he shall either buy it or convey the land to the builder. *King* v. *Catlin*, 1 Tyler, 355. A church or chapel, although *res sacræ* and not demisable, may be recovered in ejectment, by parties having a sufficient interest therein. *Thyn* v. *Thyn*, Styles, 101; *Hillingsworth* v. *Brewster*, Salk. 256; *Van Deuzen* v. *Presb. Cong. of Ft. Edward*, 3 Keyes (N. Y.), 550; 3 Trans. App. 39; 4 Abb. Ct. App. 465.

A common appendant or appurtenant to other lands may be recovered in ejectment for such other lands, provided the right of common be mentioned in the description of the premises. Adams on Eject. 19; *Black's Lessee* v. *Hepburne*, 2 Yeates, 331; *Mellengton* v. *Goodtitle*, Andrews, 106; 2 Str. 1084. Fixtures, such as a boiler, engine and stack erected upon land, are in the nature of real estate, and recoverable in ejectment. *Hill* v. *Hill*, 43 Penn. St. 521.

By statute in New York, lands escheated or forfeited to the State may be recovered by it in an action of ejectment brought by the attorney-general. 1 R. S. 666 (718), § 1.

In Pennsylvania the action will lie for an island without a survey. *Hunter* v. *Meason*, 4 Yeates, 107. In Wisconsin the projection of a foundation wall beyond the division line into the premises of another is held to be a disseizin, for which ejectment will lie. *McCourt* v. *Eckstein*, 22 Wis. 153.

Upon the principle that land includes all space above it this will not authorize an action of ejectment for such space as is occupied by a wall leaning over, or eaves, cornices or gutters projecting beyond the division line between the premises of adjoining owners. *Brady* v. *Hennion*, 8 Bosw. 528; and *Aiken* v. *Benedict*, 39 Barb. 400; *Vrooman* v. *Jackson*, 6 Hun (N. Y.). 326. And see *Hoffman* v. *Armstrong*, 48 N. Y. (3 Sick.) 201; S. C., 8 Am. Rep. 537.

An undivided estate or interest, such as that of the owner of lands in which a married woman has a homestead interest, may be recovered by writ of entry, in Massachusetts. *Castle* v. *Palmer*, 6 Allen, 401.

And, generally, ejectment will lie for the estate or interest of coparceners, tenants in common and joint tenants, except that at common law tenants in common cannot join as plaintiffs.

§ 3. **Land under water or below high-water mark.** Land which was originally below ordinary high-water mark, on navigable waters, when raised up and transformed into dry land by human labor, becomes subject to all the incidents of other land, and may be recovered in ejectment. *People* v. *Mauran*, 5 Denio, 389. It has been held in Connecticut that a riparian proprietor may in this action recover land under high-water mark, which has been entered upon and occupied by a disseisor. *Nichols* v. *Lewis*, 15 Conn. 137.

In New York, one who receives from the State a grant of land under water, for a specific use requiring actual occupation, may maintain ejectment therefor. *Champlain & St. Lawrence R. R. Co.* v. *Valentine*, 19 Barb. 484. See *Woodhull* v. *Rosenthal*, 61 N. Y. (16 Sick.) 382. The action will also lie for a pool or pit of water, since those words comprehend both land and water (Co. Litt. 5); and for land covered by a rivulet or water-course, but not for such rivulet or water-course *eo nomine*. Adams on Eject. 21; *Chancellor* v. *Thomas*, Yelv. 143. It can also be maintained for a fishery. *Rex* v. *Inhabitants of Old Arlesford*, 1 Term R. 358.

§ 4. **Public highway.** The right which the public has in a highway is usually, if not always, a mere easement or right of passage, the title to the soil, with the trees upon it, and the mines underneath, remaining in the original owner; and he or his grantee can maintain ejectment against any one who appropriates it, or any portion of it, to his private use. Adams on Eject. 21; *Goodtitle* v. *Alker*, 1 Bur. 133; *Bolling* v. *Mayor, etc., of Petersburg*, 3 Rand. 563; *Wright* v. *Carter*, 3 Dutch. 76; *Brown* v. *Galley*, Hill & Den. 308. So also may a grantor who, in conveying land, has excepted the portion included in a highway, as against his grantee who encroaches on the excepted land. *Etz* v. *Daily*, 20 Barb. 32. In such cases the plaintiff will recover the land subject to the public easement. Adams on Eject. 21.

The action will also lie to recover possession of a toll-road, when the land itself is sought to be recovered and not the mere right of way. *Mahon* v. *San Rafael T. R. Co.*, 49 Cal. 270.

But the purchaser, on execution, of a turnpike road, cannot maintain ejectment to obtain possession thereof, for the reason that it is an incorporeal hereditament. *Wood* v. *Truckee T. Co.*, 24 Cal. 474.

§ 5. **Streets in a city or village.** Unless expressly so declared by statute, or by the instrument dedicating land to public use, the fee to the land dedicated does not vest in the public, but remains in the origi-

nal owner or those deriving title from him; and he or they may maintain ejectment against one who permanently incumbers or occupies it in a manner inconsistent with or repugnant to the purposes of the dedication or grant. *Weisbrod* v. *Chicago & N. W. Ry. Co.*, 21 Wis. 602. The owner of the fee may, therefore, maintain such action against a railroad company, which has appropriated a street without making compensation to him, such appropriation being a new burden on it. *Lozier* v. *N. Y. Cent. R. R. Co.*, 42 Barb. 465; *Wager* v. *Troy Union R. R. Co.*, 25 N. Y. (11 Smith) 526; *Sharpe* v. *St. Louis, etc., R. R. Co.*, 49 Ind. 296. And this is so even though the company has merely entered and laid its track, and has not begun to use it. *Carpenter* v. *Oswego, etc., R. R. Co.*, 24 N. Y. (10 Smith) 655.

Several earlier cases in the supreme court of New York, limiting this right of action to cases where the occupation is wholly inconsistent with the public easement (*Adams* v. *Saratoga & Wash. R. R. Co.*, 11 Barb. 414), or is under claim of title beyond the mere use (*Redfield* v. *Utica & Syr. R. R. Co.*, 25 Barb. 54; *Cowenhoven* v. *Brooklyn*, 38 id. 9), may probably be deemed overruled by those cited above.

The law applicable to a street or highway is equally applicable to land dedicated for a public levee or landing, and the owner of the fee can maintain ejectment therefor against a permanent incumbrancer (*Gardiner* v. *Tisdale*, 2 Wis. 153); or the municipal corporation within which it is situated may, by such an action, try the rights of the public therein. *Village of Mankato* v. *Willard*, 13 Minn. 13.

But the plaintiff's recovery is subject to any easement in the public to use the land recovered as a street or highway. *Warwick* v. *Mayo*, 15 Gratt. 528.

§ 6. **Public square.** Where land is dedicated for use as a public square, the people, or the municipal authorities legally representing them, obtain at least a possessory title; and their exclusive right of possession for the purposes of the dedication will be protected by the courts. Accordingly, it has been held in Minnesota, that a city can maintain ejectment to recover possession of land within its limits which has been so dedicated for a public square, as against an individual who has and claims exclusive possession thereof. *Winona* v. *Huff*, 11 Minn. 119.

§ 7. **Miscellaneous instances.** Upon the principle that a grant which conveys the whole profit of the soil passes an interest in the soil itself for the time being, an ejectment will lie for a boilery of salt, that is, a grant of the salt water or a certain portion of it from a particular salt well (Adams on Eject. 19); or for grass or herbage so granted (id. 22); but it is held in Massachusetts that, unless the right of soil is

also in the plaintiff, a writ of entry will not lie for herbage or trees, as against the grantor or those claiming under him. *Rehoboth* v. *Hunt*, 1 Pick. 224. It will also lie for a mine, even though the title to the mine is separated from that of the soil; or is granted in such terms as to convey only a license to dig, search for and take metals and minerals within a certain district during the term granted; but in the latter case the grantee must have actually opened and taken possession of the premises conveyed. Adams on Eject. 20.

Where toll-houses and toll-gates have been demised to a creditor for the satisfaction of his debt out of the tolls, he may maintain ejectment therefor. *Doe* d. *Banks* v. *Booth*, 2 B. & P. 219.

If land which is subject to a right of way or other easement is exclusively appropriated, by one of the owners in common of such easement or by a stranger, the owner of the fee can recover possession, subject to the easement, by action of ejectment. *Cooper* v. *Smith*, 9 Serg. & Rawle, 26; *Bolling* v. *Mayor, etc., of Petersburg*, 3 Rand. 563; *Gordon* v. *Sizer*, 39 Miss. 805.

In Pennsylvania the action is equitable as well as legal, and in cases where equity will enforce a trust or decree a conveyance, the courts will direct a recovery in ejectment. *Peebles* v. *Reading*, 8 Serg. & Rawle, 484. They will, therefore, in such action enforce the performance of a contract for the sale of land in favor of the grantor (*Carmalt* v. *Platt*, 7 Watts, 318; *Irvine* v. *Bull*, id. 323; *Tyson* v. *Passmore*, 2 Penn. St. 122; *Marlin* v. *Willink*, 7 Serg. & Rawle, 298); or in favor of the grantee, where he has performed on his part. *Henderson* v. *Hays*, 2 Watts, 150.

A condition in a conveyance may also be enforced by ejectment; but a consideration, although amounting to a covenant, cannot be. *Soper* v. *Guernsey*, 71 Penn. St. 219. The action will also lie to enforce a lien or charge on land (*Galbraith* v. *Fenton*, 3 Serg. & Rawle, 359); but not to recover a legacy charged on land. *Gause* v. *Wiley*, 4 Serg. & Rawle, 509.

A form of action is provided by statute in several of the States, whereby a person claiming an interest in land, whether in or out of possession, can have the title of an adverse claimant tried and determined. This, though sometimes treated in connection with the action of ejectment, and in some respects resembling it, is yet too clearly distinguishable to entitle it to further notice under this head.

The cases in which ejectment will lie for demised premises, or for lands forfeited for non-performance of contracts for their sale, or for dower, will be treated under article 5 of this title.

ARTICLE III.

WHEN AND FOR WHAT PROPERTY THE ACTION DOES NOT LIE.

Section 1. In general. The rule of the common law is, that ejectment will not lie for things incorporeal or intangible, upon which an entry cannot be made, or of which the sheriff cannot deliver possession, nor for any thing which lies merely in grant. Tyler on Eject. 37; *Child* v. *Chappell*, 9 N. Y. (5 Seld.) 246; *Den* v. *Craig*, 3 Green, 191; *Black* v. *Hepburne*, 2 Yeates, 331. Some apparent modifications of this rule by statutes have been already noticed, but these are due principally to the engrafting of equitable principles upon the action, and the absence of any other remedy whereby equitable rights may be enforced in the States where they occur.

Under this rule, an ecclesiastical right, privilege or benefit, such as an advowson, a canonry or rectory, or a prebendal stall, cannot be recovered by ejectment. Adams on Eject. 18, 19; *Doe* d. *Watson* v. *Fletcher*, 8 B. & C. 25; *Doe* d. *Butcher* v. *Musgrave*, 1 Scott N. R. 451; 1 M. & G. 625; 4 Jur. 631.

Nor will the action lie for a common in gross, or for a rent (Adams on Eject. 18); or for a water-course or rivulet as distinguished from the land over which it flows. Id. 21.

A right to take all the oil which may be found on certain land is not a corporeal right, nor such a right as passes any thing for which ejectment will lie. *Dark* v. *Johnston*, 55 Penn. St. 164.

As a general rule, ejectment will not lie to recover a mere equitable estate. The United States courts adhere to this rule even where the action relates to lands in Pennsylvania, notwithstanding the courts of that State under its statutes allow a recovery upon an equitable title. *Swayze* v. *Burke*, 12 Peters, 11; *Willing* v. *Brown*, 7 Serg. & Rawle, 467. A partner's share or interest in lands of the firm is the subject of an accounting, and the remedy of a purchaser of such a share is in equity, and not by ejectment. *Clagett* v. *Kilbourne*, 1 Black (U. S.), 346.

If a trustee sells real estate contrary to the provisions of the deed of trust, the sale cannot be impeached in any action at law, but the remedy is in equity only. *Dawson* v. *Hayden*, 67 Ill. 52.

Ejectment will not lie for a mere easement, such as a tin-bound, or right to enter and mark bounds within which the party has acquired the right to work a tin mine (*Doe* d. *Earl of Falmouth* v. *Alderson*, 1 Gale, 441; 1 M. & W. 210); or for a mere right of way (*Northern Transportation Co.* v. *Smith*, 15 Barb. 355; *Judd* v. *Leonard*, 1 Chip

204; *Child* v. *Chappell*, 9 N. Y. [5 Seld.] 246); nor can the public maintain such action against one who sets up a stall in a public street. *Doe* d. *Overseers of Poor, etc.*, v. *Cowley*, 1 C. & P. 123.

Under the Pennsylvania statute it has been held that the action will not lie in favor of a widow, to recover her interest in lands of which her husband died seized; nor by a husband in his own name, to recover lands the title of which he claims in right of his wife (*Bratton* v. *Mitchell*, 7 Watts, 113); nor to recover a life estate after the death of the life tenant (*Hamilton* v. *Whiteley Township*, 12 Penn. St. 147); nor to compel the support of a testator's widow, charged upon land devised to his son (*Craven* v. *Bleakney*, 9 Watts, 19); nor to recover a legacy charged upon land.

Although the performance of a contract for the purchase of land may be specifically enforced in an action of ejectment in that State, yet, where a conveyance has been made and a bond taken for the purchase-money, the payment of such purchase-money cannot be enforced in that action. *Megargel* v. *Saul*, 3 Whart. 19.

ARTICLE IV.

WHAT TITLE OR POSSESSION REQUISITE TO MAINTAINING THE ACTION.

Section 1. In general. At common law, the party in possession of real estate is presumed to have a valid title thereto, until the contrary is proved. He is so far regarded by law as the owner, that no one can lawfully dispossess him without showing some well-founded title of a higher and better character than such possession furnishes. Some authorities hold that possession is *prima facie* evidence of seizin in fee (*Kane* v. *Cannovan*, 21 Cal. 291; *Hutchinson* v. *Perley*, 4 id. 33; *Robinoe* v. *Doe*, 6 Blackf. 85); but, inasmuch as possession is just as consistent with a lesser interest, such as one for years or for life, as with a fee, this doctrine needs to be so qualified that the presumption shall not extend beyond the right or interest claimed by the party in possession. When the extent of his claim is ascertained by reference to his declarations or acts, his possession may be resorted to as evidence to sustain it. *Adams* v. *Guice*, 30 Miss. 397; *Ricard* v. *Williams*, 7 Wheat. 59; *Jackson* v. *Porter*, 1 Paine, 457.

This presumption makes it necessary for the party who is out of possession and seeks to regain it, to show a good and sufficient title in himself. What that title shall be is also fixed by the common law, in entire consistency with the theory that the action is simply and only a legal one. Its rule is that the plaintiff must have a legal title, not a mere equitable one, to the premises claimed, and must also have a

right of entry or of possession at the time of the demise laid or the commencement of his suit, and at the time of the trial. Adams on Eject. 32; *Smith* v. *McCann*, 24 How. (U. S.) 398; *McCool* v. *Smith*, 1 Black (U. S.), 459; *Schrack* v. *Zubler*, 34 Penn. St. 38; *O'Connell* v. *Dougherty*, 32 Cal. 458.

A departure from the theory of the action necessarily involves a modification of the rule, as will appear hereafter.

The rule of the common law still prevails in a majority of the American States, though the language employed by their statutes in announcing it varies in the different States. In some, the terms used are, "a legal title and right of possession;" in others, "an estate of freehold in fee simple, fee tail, or for life," or "a title in fee, for life or years;" and in others still, "a valid subsisting interest and right of possession;" but these all, as applied by the courts, resolve themselves into the title and right required by the common law. *Allen* v. *Smith*, 6 Blackf. 527; *Eaton* v. *Smith*, 19 Wis. 537; *Leonard* v. *Diamond*, 31 Md. 536; *Mulford* v. *Tunis*, 35 N. J. L. 256; *Dyer* v. *Day*, 61 Ill. 336; *Beach* v. *Beach*, 20 Vt. 83; *Thompson* v. *Adams*, 55 Penn. St. 479; *Daniel* v. *Lefevre*, 19 Ark. 201.

The action of ejectment is a possessory one, and is founded upon the principle that the defendant in possession is a wrong-doer in withholding the premises from the plaintiff; and unless he is so at the time the latter brings his action, it cannot be sustained. A present right of possession in the plaintiff is, therefore, essential. *Cincinnati* v. *White*, 6 Peters, 431; *Heffner* v. *Betts*, 32 Penn. St. 376; *Payne* v. *Treadwell*, 5 Cal. 310. He must have it at the commencement of the suit (*Kile* v. *Tubbs*, 32 Cal. 332); and also at the time of trial (*Cresap* v. *Hutson*, 9 Gill, 269; *Alden* v. *Grove*, 18 Penn. St. 377; *Torrance* v. *Betsy*, 30 Miss. 129); though it is held in Vermont that his being divested of title during a portion of the intervening period by his own act will not prevent his recovery. *Edgerton* v. *Clark*, 20 Vt. 264. In Connecticut a right of possession derived from the holder of the legal title is sufficient. *Law* v. *Wilson*, 2 Root, 102.

The effect of the statute 3 and 4 Wm. IV, ch. 27, is to reduce all land titles in England to possessory titles, and make the remedy by ejectment co-extensive with the right of recovery of possession as limited thereby.

By statute in the State of Texas the action can be maintained upon an equitable as upon a legal title. *Browning* v. *Estes*, 3 Tex. 462; *Walker* v. *Howard*, 34 id. 478. So, also, in the State of Kansas, where it is made sufficient for the claimant to allege that he has a legal or equitable estate and right of possession (*Kansas, etc., R. R. Co.* v. *McBrat-*

ney, 12 Kan. 9); and in North Carolina, where it is held that the equitable owner of land may maintain an action for its recovery, although the legal estate is in his trustee. *Murray* v. *Blackledge*, 71 N. C. 492. An equitable title is also sufficient to sustain the action under the statutes of Pennsylvania. *Willing* v. *Brown*, 7 Serg. & R. 467; *Peebles* v. *Reading*, 8 id. 484. These variations from the ordinary rule in the former States are attributable to the introduction of equitable principles into legal actions, which is one of the most notable features of modern jurisprudence. In the latter State it is due to the fact that there is no court of chancery, and hence the law courts exercise jurisdiction and furnish relief in cases which elsewhere would belong to courts of equity. *Swayze* v. *Burke*, 12 Peters, 11; *Henderson* v. *Hays*, 2 Watts, 150.

§ 2. **Plaintiff must recover upon his title.** It is a universal rule that the party claiming a right to lands must recover, if at all, on the strength of his own title, and not on the defects in that of his adversary. Adams on Eject. 30; *Wallace* v. *Swinton*, 64 N. Y. (19 Sick.) 188; *Goulding* v. *Clark*, 34 N. H. 148; *Boylan* v. *Meeker*, 4 Dutch. 274; *Butler* v. *Davis*, 5 Nebr. 52. Where neither party has the true title, the plaintiff's success in the action will depend upon his showing a better right than the defendant; and as between the two, he who shows a prior possession will be deemed to have the better right.

The presumption of title in the defendant arising from his possession must be overcome by proof of a title in the plaintiff, which is good at least against the defendant. *Eldon* v. *Doe*, 6 Blackf. 341; *People* v. *Leonard*, 11 Johns. 504; *Sullivan* v. *Dimmitt*, 34 Tex. 114; *Douglass* v. *Libbey*, 59 Me. 200; *Tracy* v. *Norwich, etc., R. R. Co.*, 39 Conn. 382; *Foster* v. *Evans*, 51 Mo. 39; *Farley* v. *Goocher*, 11 Iowa, 570; *Stehman* v. *Crull*, 26 Ind. 436; *Holbrook* v. *Nichol*, 36 Ill. 161, *Stanford* v. *Mangin*, 30 Ga. 355; *Millaudon* v. *Ranny*, 18 La. Ann. 196. Even as against one in possession without title, the plaintiff must show some title in himself, or that the defendant is in under him. *Perry* v. *Whipple*, 38 Vt. 278. If he sues in the name or for the use of another, or the proof shows the legal title to be in another, he must connect himself with the title of such other, or he cannot recover. *Ballance* v. *Flood*, 52 Ill. 49; *Brooking* v. *Dearmond*, 27 Ga. 58; *Adams* v. *McDonald*, 29 id. 571.

In a suit by several plaintiffs, all must show a legal title and right to immediate possession of the premises, not only at the time the action was commenced, but also at the time of the trial and judgment. *Cheney* v. *Cheney*, 26 Vt. 606; *Alden* v. *Grove*, 18 Penn. St. 377.

Neither a right of entry, as distinct from the right of property or of action, nor an actual entry, is now necessary, but it is sufficient if the plaintiff has such title as he claims and a right of possession. Adams on Eject. 34; *Hylton's Lessee* v. *Brown*, 1 Wash. C. C. 204. Even an equitable title is sufficient where, by the laws of the State, it gives a legal right of entry. *Sims* v. *Irvine*, 3 Dall. 425.

A title to land founded upon or traced back to a patent from the State as the original source of title is *prima facie* sufficient to support ejectment. *Savory* v. *Whayland*, 1 Harr. & McHen. 206; *Hopkins* v. *Ward*, 6 Munf. 38; *Hull* v. *Campbell*, 56 Penn. St. 154. In some of the States it has been held to be essential that the plaintiff should trace his title back to the government (*Mitchell* v. *Mitchell*, 1 Md. 44); or to some one who had the legal title, or who died seized of the premises, or who had twenty years' uninterrupted and exclusive possession (*Brown* v. *Brown*, 15 La. Ann. 169; *Young* v. *Chamberlain*, id. 454; *Plummer* v. *Lane*, 4 Harr. & McHen. 72); but, under the rule which prevails generally, such proof is not necessary, because the legal right of possession, and not the ultimate title to the land, is the subject of the controversy. *Wood* v. *West*, 1 Blackf. 133. The statement sometimes made, that the plaintiff must show a perfect title, is, therefore, too broad. Where his title is subsequent to the date of the defendant's possession, he cannot recover without showing a perfect title (*Patterson* v. *Litton*, 23 La. Ann. 274); but ordinarily his title need not be perfect against all the world. He must have a sound and sufficient title. (*Fowler* v. *Nixon*, 7 Heisk. 719), and one which is perfect as against the defendant (*Yoe* v. *Dyer*, 6 Heisk. 16); and that is sufficient. *Garrett* v. *Lyle*, 27 Ala. 586; *Clark* v. *Diggs*, 6 Ired. 159. He need not have a fee simple where the defendant has no title. *Lewis* v. *Goguette*, 3 Stew. & Port. 184. A presumptive title, or one which is subject to some defects, may be sufficient. *Johnston* v. *Jackson*, 70 Penn. St. 164; *Campbell* v. *Fletcher*, 37 Md. 430.

Unless the plaintiff shows a better title than the defendant he cannot recover (*Kennedy* v. *Skeer*, 3 Watts, 95; *Jack* v. *Dougherty*, id. 151); but where the parties claim under conflicting titles, and the only question is, which of the two is good, the best title must prevail. *Busenius* v. *Coffee*, 14 Cal. 91. A title which is apparently good is sufficient against a mere trespasser or wrong-doer. *Zeringue* v. *Williams*, 15 La. Ann. 76; *Davison* v. *Gent*, 38 Eng. L. & Eq. 469; 1 H. & N. 744.

A conditional fee is sufficient to support an ejectment before breach. *Candee* v. *Burke*, 1 Hun, 546; 4 N. Y. Sup. (T. & C.) 143. A title by estoppel is also sufficient (*Stoddard* v. *Chambers*, 2 How. [U. S.] 284);

or a title by descent from one who died seized. *Smith* v. *Lorillard*, 10 Johns. 338.

A deed by husband and wife of the wife's land conveys sufficient title to enable the grantee to maintain ejectment, although the acknowledgment of the wife be defective. *Bryan* v. *Wear*, 4 Mo. 106. A title based upon lost instruments will enable the holder to recover in the action, without first resorting to equity to prove the making and loss of such instruments. *Donaldson* v. *Williams*, 50 Mo. 407.

As a general rule, a devise or conveyance in trust gives the trustees the legal estate, and they may, therefore, maintain ejectment against any one in possession of the trust property, even though he be the *cestui que trust*. *Cox* v. *Walker*, 26 Me. 504; *Goodtitle* v. *Jones*, 7 Term R. 47; *Beach* v. *Beach*, 14 Vt. 28; *Jackson* v. *Pierce*, 2 Johns. 226; *Mathews* v. *Ward*, 10 Gill & Johns. 444, 456; *Baker* v. *Nall*, 59 Mo. 265; *Mordecai* v. *Parker*, 3 Dev. 42[6] As against a mere intruder, or one showing no title, it makes no difference whether the legal title is in the plaintiff absolutely or whether he holds it in trust. *Lair* v. *Hunsicker*, 28 Penn. St. 115.

At common law a trustee takes only that quantum of interest which is necessary to carry out the purposes of the trust, and is permitted by the terms of the instrument creating it; and when the execution of the trust no longer requires the existence of the legal estate in him, it vests in the person beneficially entitled. *Jeffreson* v. *Morton*, 2 Saund. 11; *Doe* v. *Nicholls*, 1 B. & C. 336; *Doe* v. *Ewart*, 7 A. & E. 636. Therefore, it is held that, after the purposes of the trust have been satisfied, the *cestui que trust*, if entitled to possession, may maintain ejectment, although the legal estate may yet remain in the trustee. *Hopkins* v. *Ward*, 6 Munf. 38. In Pennsylvania his equitable estate is sufficient to enable him to do so. *Hunt* v. *Crawford*, 3 Pen. & W. 426.

By statute in some of the States, unless some actual power of disposition or management of the property is conferred upon the trustees, they take no estate but it vests directly in the *cestui que trust*, and he is entitled to the possession and may sue therefor. A *cestui que trust*, who paid the consideration for the land, holds both the legal and equitable title. *N. Hempstead* v. *Hempstead*, 2 Wend. 109. But see, to the contrary, *Moore* v. *Spellman*, 5 Denio, 225, 231.

A bond for the conveyance of land gives sufficient title to sustain ejectment by the vendee, against a mere trespasser, without proof of compliance on his part with its conditions. *Hooper* v. *Hall*, 30 Tex. 154.

An inchoate title, obtained by proceedings under the statutes of the Federal or State government to acquire title to public lands, is by statute in many of the States made sufficient to sustain the action. Thus, in Arkansas and Wisconsin, a pre-emption right, or an entry in the land office witnessed by the receiver's receipt (*Manny* v. *Smith*, 10 Wis. 509; *Rector* v. *Gaines*, 19 Ark. 70); in Mississippi, a land office certificate (*Davis* v. *Freeland*, 32 Miss. 645); in California, a State certificate of purchase obtained prior to the filing of a homestead claim (*Young* v. *Shinn*, 48 Cal. 26), or a Mexican grant approved by proper authority (*Gunn* v. *Bates*, 6 Cal. 263; *Tobin* v. *Walkinshaw*, 1 McAll. C. C. 154); in North Carolina, a certificate of purchase of Indian lands from the State commissioners (*State* v. *England*, 7 Ired. 153); in Texas, a certificate for head rights, land scrip, bounty warrants, and other certificates of title (*Sheirburn* v. *De Cordova*, 24 How. [U. S.] 423); in Pennsylvania, a warrant, survey and payment of purchase-money (*Willink* v. *Miles*, Peters' C. C. 429); in Missouri, a New Madrid certificate and copy of survey (*Rector* v. *Welsh*, 1 Mo. 334), or a confirmation of a claim to a land title under the laws of the United States (*Janis* v. *Gurmo*, 4 Mo. 458), are sufficient to support ejectment.

In Wisconsin, a certificate of sale by the commissioners of school and university lands confers sufficient title to sustain ejectment against a subsequent patentee. *Gunderson* v. *Cook*, 33 Wis. 551.

In Colorado, an entry and occupation of lands by virtue of any lease or permit of the United States or of the State is sufficient as against one who enters without the consent of the lessee. *Milsap* v. *Stone*, 2 Colo. 137.

A power to lease land passes by implication the power to defend or recover the possession by action. *Windham* v. *Chisholm*, 35 Miss. 531.

A purchase at a sale by an administrator under an act of the legislature for the payment of the debts of the deceased gives a title which will prevail in ejectment against a voluntary deed given by the deceased in his life-time. *Manwaring* v. *Dishon*, 1 Root, 478.

A purchaser, under an execution sale, may recover against the defendant in the execution where he holds merely by virtue of an after-acquired possession. *Matney* v. *Graham*, 50 Mo. 190. A sheriff's deed is a good title to sustain an action of ejectment. *Maynard* v. *Moore*, 70 N. C. 546; *Kimbrough* v. *Benton*, 3 Humph. 129; *Mitchell* v. *Lipe*, 8 Yerg. 179.

In Maryland, after default made in a mortgage which provides that the premises shall be forfeited on default, and the mortgagee may thereupon sell the same, the latter has sufficient title to maintain ejectment

against one who claims under a sheriff's sale on a judgment against the mortgagor. *Ahern* v. *White*, 39 Md. 409. As to when the action may be sustained between mortgagor and mortgagee, see art. 5.

In Pennsylvania, the title to land which has been sold for municipal claims is not wholly divested by the sale, but, upon tender of the redemption money within one year, the former owner may maintain ejectment against the person in possession. *Hess* v. *Potts*, 32 Penn. St. 407.

Even a claim to wild land, with payment of taxes for many years, has been held sufficient to sustain the action in Ohio. *Winthop* v. *Grimes*, Wright, 330.

The title of a tenant for life or for years, who has the exclusive possession of the land, is sufficient for that purpose, whether he claims in his own right or in right of his wife. A husband has such an interest in his wife's land, or in land conveyed to himself and his wife, as will sustain the action. *Chambers* v. *Handley*, 3 J. J. Marsh. 98; *Jackson* v. *Leek*, 19 Wend. 339; *Gregg* v. *Tesson*, 1 Black, 150.

A life interest in land, founded on the owner's agreement to allow the plaintiff to put up a saw-mill on certain premises for the purpose of carrying on the business of sawing "as long as he pleases," or a right reserved in a deed "to erect a mill-dam at a specified place, and to occupy and possess the premises without any hindrance or molestation from the grantee or his heirs," is also sufficient. *Stancel* v. *Calvert*, 1 Wins. 104; *Jackson* v. *Buel*, 9 Johns. 298. Even the title of a tenant at will is held sufficient in Indiana (*Buntin* v. *Doe*, 1 Blackf. 26); or any right to enter and make a lease. *Duchane* v. *Goodtitle*, 1 Blackf. 117. So, also, is a joint demise by several heirs. *Robinoe* v. *Doe*, 6 Blackf. 85.

A right to land for a bridge site, acquired by the exercise of the right of eminent domain, will enable the State or its grantee to maintain ejectment against the former owner. *James Riv. & Kan. Co.* v. *Thompson*, 3 Gratt. 270.

It is not necessary that the plaintiff in ejectment should have the entire title, but an undivided interest, such as that of a tenant in common, coparcener or joint tenant, will sustain the action. *Hughes* v. *Holliday*, 3 G. Greene, 30; *Elliss* v. *Ellis*, 4 Jur. (N. S.) 1181; 27 L. J. Q. B. 316; *Alford* v. *Dewin*, 1 Nev. 207; *Hicks* v. *Rogers*, 4 Cranch, 165; *Doe* v. *Butler*, 3 Wend. 149.

§ 3. **Title derived from a common source.** When both parties in an ejectment suit claim title from the same source, the question between them is, which has the best title; and all that the plaintiff needs to do in order to recover is, to show that he has a better title from the common grantor than has the defendant. That some one else has a still

better title does not matter in such a case. *Union Bank* v. *Manard*, 51 Mo. 548; *Seabury* v. *Stewart*, 22 Ala. 207. After tracing his title to the person under whom both claim, the plaintiff need not show title in such person, because the defendant is estopped from disputing it. *Ames* v. *Beckley*, 48 Vt. 395; *Riddle* v. *Murphy*, 7 Serg. & R. 230; *Hightower* v. *Williams*, 38 Ga. 597; *Wortham* v. *Cherry*, 3 Head, 468; *Clark* v. *Trindle*, 52 Penn. St. 492; *Gordon* v. *Sizer*, 39 Miss. 805; *Paschal* v. *Acklin*, 27 Tex. 173; *Merchants' Bank* v. *Harrison*, 39 Mo. 433; *Sexton* v. *Rhames*, 13 Wis. 99; *Touchard* v. *Crow*, 20 Cal. 150; *Holbrook* v. *Brenner*, 31 Ill. 501.

Therefore in an action by a mortgagee to recover the mortgaged premises from the widow and heir of the mortgagor, it is immaterial whether the chain of title of such mortgagor was perfect. *Pollock* v. *Maison*, 41 Ill. 516.

Where the plaintiff claims as purchaser on execution, he need only prove that the execution defendant was in possession at the time of the sale. *Hartley* v. *Ferrell*, 9 Fla. 374.

Where the defendant in ejectment claims through a purchase of the property at sheriff's sale, under a judgment in favor of a third party against the plaintiff, he thereby admits the title of the latter up to the date of the sale, and concedes to him a *prima facie* case. *Brown* v. *Brown*, 45 Mo. 412.

§ 4. **Color of title.** A very common and very general definition of color of title is, "that which in appearance is title, but in reality is no title." More accurately defined, it is an apparent title founded upon a written instrument, such as a deed, levy of execution, decree of court, or the like. Thus, a deed or survey of land placed upon the record of land titles, whereby notice is given to the true owner and all the world that the occupant claims the title (3 Washb. Real Prop. 138; *Hodges* v. *Eddy*, 38 Vt. 327, 345); or any instrument in writing having a grantor and a grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands therein described. *Brooks* v. *Bruyn*, 35 Ill. 394. A claim to real property under a conveyance, however inadequate it may be to carry the true title, or however incompetent the grantor to convey such title, is strictly a claim under color of title. *Edgerton* v. *Bird*, 6 Wis. 527.

Such a claim may, by force of the statute of limitations, ripen into a complete title, which will enable him in whom it is vested, if plaintiff, to maintain an action of ejectment, if defendant, to defeat it. It is important to be noticed here, because adverse possession, to ripen into an actual title, must have commenced under color or claim of title.

It is not indispensable, as we have before seen, that the plaintiff in ejectment shall show a perfect indefeasible estate in fee simple, in order to recover against one who has no legal right either of possession or property (*Lewis* v. *Goguette*, 3 Stew. & Port. 184); yet, except in cases where prior possession alone is sufficient, he must show either actual or colorable title in himself (*Brooking* v. *Dearmond*, 27 Ga. 58; *Adams* v. *McDonald*, 29 id. 571); and it cannot avail him to show that a third person has a better right than the defendant, unless he in some way connects himself with the title of such person. *Bailey* v. *March*, 3 N. H. 274.

To give color of title the instrument or conveyance must be good in point of form, profess to convey the entire title, and be properly executed. *La Frombois* v. *Jackson*, 8 Cow. 589; *Dufour* v. *Campane*, 11 Mart. 715; *Frigue* v. *Hopkins*, 4 Mart. (N. S.) 224. One which is void on its face, or discloses facts which show that the person purporting to convey title had none, is not sufficient. *Moore* v. *Brown*, 11 How. (U. S.) 424; *Simmons* v. *Lane*, 25 Ga. 178; *Marsh* v. *Weir*, 21 Tex. 97.

A conveyance from a grantor who occupied the premises at the time of the grant gives a *prima facie* title, which is good against a stranger. *Wofford* v. *McKinna*, 23 Tex. 46; *Charle* v. *Saffold*, 13 id. 94; *Pillow* v. *Roberts*, 13 How. 472. A deed from a married woman gives color of title to the grantee. *Sanborn* v. *French*, 22 N. H. 246. An ordinary quitclaim deed conveys sufficient title to enable the grantee to maintain ejectment, if the grantor could have done so. *Sullivan* v. *Davis*, 4 Cal. 291; *Downer* v. *Smith*, 24 id. 114.

A grant by one to whom land has been devised or conveyed in trust has been held to convey to his grantee the same legal title and right of action which he himself possessed, even though the transfer was a breach of trust. *Canoy* v. *Troutman*, 7 Ired. 155; *Reece* v. *Allen*, 5 Gilm. 241; *Taylor* v. *King*, 6 Munf. 358.

A title acquired by a mortgagee through a purchase at his own sale is good until the sale is set aside, and will support ejectment. *Hawkins* v. *Hudson*, 45 Ala. 482. A purchase at sheriff's sale gives sufficient title for that purpose, if the execution defendant was in possession at the time of the sale. *Jackson* v. *Graham*, 3 Caines, 188; *Jackson* v. *Davis*, 18 Johns. 7; *Young* v. *Algeo*, 3 Watts, 223; *Davis* v. *Evans*, 5 Ired. 525; *Brock* v. *Yongue*, 4 Ala. 584; *Matney* v. *Graham*, 59 Mo. 190. If he was not then in possession, proof will be required to show that he had some title or interest which was subject to the judgment lien. A sheriff's deed is good as color title, although not on its face sufficient to convey title, if the purchaser takes and holds under it.

Jackson v. *Newton*, 18 Johns. 355; *Burkhalter* v. *Edwards*, 16 Ga 593; *Den* v. *Putney*, 3 Murph. 562.

A deed purporting to be executed by virtue of a power of attorney from the owner of the land gives color of title, although the power is not proved. *Monro* v. *Merchant*, 28 N. Y. (1 Tiff.) 9. See *Thompson* v. *Burhans*, 61 N. Y. (16 Sick.) 52, 60.

A purchase at a tax sale, followed by possession and inclosure under it, also gives sufficient title to sustain the action. *Wilkes* v. *Elliot*, 5 Cranch's C. C. 611; *Dillingham* v. *Brown*, 38 Ala. 311; *Prescott* v. *Nevers*, 4 Mason, 326; *Little* v. *Megquier*, 2 Me. 176; *Minot* v. *Brooks*, 16 N. H. 376.

The deed or color of title under which a person takes possession of land serves to define specifically the boundaries of his claim or possession, and as a general rule limits it to that which is included within the description. *Ellicott* v. *Pearl*, 10 Peters, 412; *Armour* v. *White*, 2 Hayw. 87.

As already noticed, a claim of title is also efficacious as a ground of title by adverse possession; and neither a deed, nor any equivalent muniment of title is necessary for that purpose, where an actual occupation, with an oral claim of exclusive title, or other circumstances by which the absolute owner is ordinarily distinguished from the naked possessor. *Sands* v. *Hughes*, 53 N. Y. (8 Sick.) 287.

§ 5. **Plantiff's prior possession.** Possession of land under a claim or color of title, continued for the number of years prescribed by statute, confers a title which is good even against the previous owner, and will enable the possessor to maintain ejectment against any one who interferes with his possession. How long such possession must continue in order to confer such title will be considered more particularly when we come to treat of defenses.

Possession by the grantee under a defective deed, for several years, renders such deed competent to convey to him a title which will enable his heir to maintain ejectment. *Brashear* v. *Hewitt*, 4 Harr. & McHen. 222. An actual occupation by the grantee in a tax deed of part of the premises included therein does not in all cases draw to it the possession of the whole, so that he can maintain ejectment as against a mere intruder or trespasser upon any part thereof, where his deed is void. *Thompson* v. *Burhans*, 61 N. Y. (16 Sick.) 52. In the case of an ordinary deed the possession of a part may be good for the whole tract. *Hicks* v. *Coleman*, 25 Cal. 122. Actual possession or cultivation of part of a tract, and use of the balance as woodland, and payment of taxes on the whole, continued for twenty-one years, show title to the whole in

the party so possessing it. *Murphy* v. *Springer*, 1 Grant's Cas. 73; *Plume* v. *Seward*, 4 Cal. 94.

A plaintiff in ejectment who claims by adverse possession does not lose the benefit of such possession as a ground of title, even by accepting a quitclaim deed from the defendant's grantor, when the object of such deed is not to defeat but to confirm existing rights; as, when it is given simply to correct a misdescription of the land in a prior deed under which plaintiff's ancestor went into possession. *Wall* v. *Shindler*, 47 Mo. 282.

A prior possession of lands under color of title will enable a party to recover them, unless the defendant shows a better title, or unless the plaintiff is barred by the statute of limitations; and an older possession under color of title will prevail against a later one. *Russell* v. *Erwin's Admr.*, 38 Ala. 44. Such possession, held by several parties with consent of the legal owner, is sufficient to enable a corporation, afterward formed by them for purposes connected with the use of the land, to maintain ejectment therefor. *Rockland, etc., Oil Co.* v. *McCalmont*, 72 Penn. St. 221.

Where two persons are in mixed possession of the same land, claiming adversely to each other, the law will deem him who has the best title to be the rightful possessor (*Cheney* v. *Ringgold*, 2 Harr. & J. 87; *Page* v. *O'Brien*, 36 Cal. 559; *Mather* v. *Ministers, etc.*, 3 Serg. & R. 509); but where neither of the parties shows any legal title, the one showing prior possession will be held to have the better right (*Hubbard* v. *Barry*, 21 Cal. 321; *Schultz* v. *Arnot*, 33 Mo. 172; *Wilson* v. *Palmer*, 18 Tex. 592; *Shumway* v. *Phillips*, 22 Penn. St. 151; *Tapscott* v. *Cobbs*, 11 Gratt. 172); and he will prevail in ejectment. *Buckner* v. *Chambliss*, 30 Ga. 652; *Jackson* v. *Hazen*, 2 Johns. 22; *Law* v. *Wilson*, 2 Root, 102; *Campbell* v. *Roberts*, 3 A. K. Marsh. 623.

Bare possession constitutes a sufficient interest in land to sustain ejectment against a mere wrong-doer or intruder. *Bates* v. *Campbell*, 25 Wis. 613; *Newnam* v. *Cincinnati*, 18 Ohio, 323; *Nagle* v. *Macy*, 9 Cal. 426. Such possession of a mining claim is sufficient in California, neither party having title. *Richardson* v. *McNulty*, 24 Cal. 339. Mere possession is not sufficient, however, where the title is shown to be out of the plaintiff. *Nagle* v. *Shea*, 8 Ir. C. L. 224.

Prior possession accompanied by a claim of title is sufficient to support the right of a party and his grantee to eject one who has only a naked possession. *Dale* v. *Faivre*, 43 Mo. 556. A prior possession by one from whom the plaintiff deduces his title, with acts of

ownership on his part, are sufficient as against one who has no title. *McCall* v. *Pryor*, 17 Ala. 533; *McKay* v. *Kendrick*, 44 Ga. 607. Plaintiff's possession alone is *prima facie* sufficient to sustain ejectment until the defendant shows an earlier possession, or title from a paramount source (*Keane* v. *Cannovan*, 21 Cal. 291); and if evicted, he can maintain the action without showing title as against a grantee of his disseisor, who is also without title. *Clute* v. *Voris*, 31 Barb. 511. See *Lull* v. *Davis*, 1 Mich. 77, 81.

Prior possession is also good against one who has ousted the possessor and claims under an escheated title, where it does not appear that the original holder has deceased without heirs. *Hutchins* v. *Erickson*, 1 Harr. & McHen. 339.

To constitute a possession sufficient to enable the holder to maintain ejectment there must be an actual *bona fide* occupation and subjection of the land to his will and control, not a mere assertion of title, or the exercise of casual acts of ownership, such as recording deeds, paying taxes, etc. *Plume* v. *Seward*, 4 Cal. 94; *Lawrence* v. *Fulton*, 19 id. 683; *Garrison* v. *Sampson*, 15 id. 93. A constructive possession is never based on a claim merely, but must be upon a deed purporting to convey the whole, or some proceeding giving color and defining the boundaries as well as actual possession of a part. *Long* v. *Higginbotham*, 56 Mo. 245. A plaintiff, relying upon his possession, must show an actual possession or occupation of the land by himself or his grantors, under claim of title. *Borel* v. *Rollins*, 30 Cal. 408. Where he relies upon an inclosure as an act of possession, he must show that it is substantial and such as a prudent farmer would erect to protect his crops. *Polack* v. *McGrath*, 32 Cal. 15. Building a fence which will turn cattle around a lot and using it for pasture is sufficient as against a mere intruder. *Southmayd* v. *Henley*, 45 Cal. 101.

An entry to make partition, with other acts of claim, are evidence of possession, and if under claim of right will sustain ejectment. *Kirkland* v. *Thompson*, 51 Penn. St. 216.

The plaintiff's possession must also be continuous, or at least it must be shown that it has not been abandoned. *Wilson* v. *Palmer*, 18 Tex. 592; *Jones* v. *Ridley*, 2 Law Rep. 397; *DeHaven* v. *Landell*, 31 Penn. St. 120.

If one claiming by possession does not bring his suit within a reasonable time after being ejected, he must show his intention to return and satisfactorily account for the delay, otherwise he will be deemed to have abandoned his possession. *Whitney* v. *Wright*, 15 Wend 171. See 4 Hill, 466. The time within which he must show a pos-

session is generally fixed by statute. In New Jersey and several other States the time fixed is twenty years. *Den* v. *Morris*, 2 Halst. 6.

Possession by the mortgagor until his death is sufficient to enable the purchaser at the foreclosure sale to maintain ejectment. *Worthington* v. *Etcheson*, 5 Cranch's C. C. 302.

Prior possession by an ancestor claiming title will enable the heir to recover against a subsequent possession of less than twenty years without title. *Ludlow's Heirs* v. *McBride*, 3 Ham. 240; *Maltonner* v. *Dimmick*, 4 Barb. 566. If an ancestor dies in the adverse possession of land, and his heirs upon whom descent is cast remain in possession after his death, that is *prima facie* sufficient to enable them to maintain ejectment. *Hanna* v. *Renfro*, 32 Miss. 125.

In an action by an administrator to recover the lands of his intestate, under the statutes of Arkansas, proof that such intestate died in possession is *prima facie* evidence of seizin in fee, and is sufficient unless that presumption is rebutted. *Carnall* v. *Wilson*, 21 Ark. 62.

§ 6. **Length of possession sufficient.** A plaintiff who rests his claim upon prior possession must allege and prove that he had such possession within the time fixed by the statute of limitations for acquiring title by adverse possession, which is ordinarily twenty years. In North Carolina that time is fixed at seven years, and the plaintiff is not required to show title within that time; but if he has a title deed or grant, his right of entry and of action continues until destroyed by seven years' actual adverse possession under color of title. *Young* v. *Irwin*, 2 Hayw. 9.

The allegation of seizin or possession in plaintiff's declaration or complaint must, as a general rule, refer to a time when his right of possession actually existed.

As to the length of possession which the plaintiff must show in order to sustain the action, the statutes of the several States differ. In most of them adverse possession, to give the right of action as against the holder of the legal title, must have continued for twenty years. *Jackson* v. *Oltz*, 8 Wend. 440; *Holtzapple* v. *Phillibaum*, 4 Wash. C. C. 356; *Carroll* v. *Mays*, 8 Dana, 178; *Chiles* v. *Conley*, 9 Dana, 385; *Cannon* v. *Phillips*, 2 Sneed, 211; *Abel* v. *Hutto*, 8 Rich. 42.

In Delaware it has been held that ejectment cannot be maintained against a mere trespasser on the strength of a title by possession alone, unless such possession has continued for twenty years. *Doe* d. *Jefferson* v. *Howell*, 1 Houst. 178. In some other States a longer possession seems to be required. Thus, an actual possession of a small tract of

land by a mere intruder for more than twenty-one years has, in Pennsylvania, been held sufficient to enable him to maintain the action against a previous intruder, who claimed the same as part of a larger tract upon which he had entered six years earlier, where it appeared that he had not made known the extent of his claim or marked its boundaries, although he had paid the taxes on such larger tract for many years. *Huey* v. *Smith*, 3 Penn. St. 353. And one who enters upon vacant land with the intention of leaving when the real owner comes and claims it, and even tries to find such owner and purchase from him, if he continues such possession for twenty-one years, thereby acquires a perfect title against such real owner, which will sustain an ejectment against him on his entry after the lapse of that time. *Patterson* v. *Reigle*, 4 Penn. St. 201.

In Missouri, possession by the plaintiff or his grantors for more than thirty years with claim of right will warrant a recovery, unless defeated by a better title in defendant. *Davis* v. *Thompson*, 56 Mo. 39.

Ordinarily, the oldest possession, though less than twenty years, carries with it a presumption of title which is sufficient to put the defendant on his defense, and will overcome the later possession of a mere trespasser. *Den* v. *Sinnickson*, 4 Halst. 149; *Leport* v. *Todd*, 3 Vroom, 124; *Smith* v. *Lorillard*, 10 Johns. 338. It is sufficient to sustain ejectment against all but the true owner and devisee in fee. *Asher* v. *Whitelock*, L. R., 1 Q. B. 1; 11 Jur. (N. S.) 925; 35 L. J. Q. B. 17; 14 W. R. 26. Fifteen years' prior possession under claim of title has been held sufficient as against a mere trespasser in Vermont, and also in Virginia. *Barlow* v. *Bowne*, Brayt. 135; *Middleton* v. *Johns*, 4 Gratt. 129. In Pennsylvania, twelve years' seizin of the freehold by one who died seized is held to give a right of entry and support ejectment against a tortious holder. *Den* v. *McCan*, 2 Penn. (N. J.) 438. And in New York eight or ten years' possession under color of title is sufficient for that purpose. *Jackson* v. *Harder*, 4 Johns. 202; *Dominy* v. *Miller*, 33 Barb. 386.

A prior possession however short is *prima facie* sufficient against a wrong-doer. *Doe* d. *Hughes* v. *Dyeball*, 3 C. & P. 610; *Davison* v. *Gent*, 1 H. & N. 744; 3 Jur. (N. S.) 342; 38 Eng. L. & Eq. 439.

But possession by a husband for eighteen years, followed by the possession of the widow for thirteen years after he died leaving children, does not connect his possession with hers so as to give her a right of possession and action. *Doe* d. *Carter* v. *Banard*, 13 Q. B. 945. Nor will a possession for many years under a deed declaratory of a beneficial interest, containing a covenant to convey the legal estate, raise a

presumption of a conveyance or entitle the possessors to maintain the action. *Goodright* v. *Swymmer*, Ld. Ken. 385.

§ 7. **Showing possession of defendant.** The theory of the action of ejectment is, that the defendant has wrongfully deprived the plaintiff of the possession of the premises in controversy, or is wrongfully detaining them from him; and its object is the determination of the question, which of the parties litigant has the better right to such possession. As a general rule, therefore, and the only rule consistent with that theory, the plaintiff must show not only his own right, but that the defendant was in possession at the commencement of the action, either by himself or by his tenant. *Pierce* v. *Tuttle*, 53 Barb. 155; *Kerr* v. *Leighton*, 2 G. Greene, 196; *Doe* v. *Roe*, 30 Ga. 553; *Daniel* v. *Lefevre*, 19 Ark. 201; *Doe* v. *Stradling*, 2 Stark. 187; *Cooper* v. *Smith*, 9 Serg. & R. 26; *Child* v. *Chappell*, 9 N. Y. (5 Seld.) 246; *Wyman* v. *Brown*, 50 Me. 139; *Costly* v. *Tarver*, 38 Ala. 107; *Dilley* v. *Sherman*, 2 Nev. 67; *Owen* v. *Fowler*, 24 Cal. 192. Possession by one of several joint defendants is sufficient to entitle the plaintiff to recover against him. *Gordon* v. *Sizer*, 39 Miss. 805. In Vermont, the defendant is liable if he is in possession at the time of the service of the writ, or if he has a deed to himself recorded and claims to have purchased. *McDaniels* v. *Reed*, 17 Vt. 674.

Possession of a mere easement to flow lands under a claim of right is not sufficient to sustain the action, where the plaintiff has the undisputed control of the premises subject to the easement. *Wilklow* v. *Lane*, 37 Barb. 244.

Under the old consent rule, proof of such possession was made by the confession of the defendant in signing the rule, and it is so still where that rule prevails. By statute in many of the States such proof is now dispensed with, or the putting in of a plea of the general issue, or some other plea which denies the plaintiff's title, or claims title or right of possession in the defendant, is made equivalent to an admission of possession. *Kerr* v. *Leighton*, 2 G. Greene, 196; *Atwell* v. *McLure*, 4 Jones' L. R. 371; *Perkins* v. *Raitt*, 43 Me. 280. A mere failure to file a disclaimer as to the whole or any part of the premises is, in Maine, an admission of possession of the whole. *Blake* v. *Dennett*, 49 Me. 102.

If a person procures himself to be made a defendant for the purpose of asserting his own claims, he will be estopped from denying his possession. *Mordecai* v. *Oliver*, 3 Hawks. 479; *Gorham* v. *Brenon*, 2 Dev. L. 174.

The principle of estoppel will also apply to the case of assignees of bankrupt who refuses to yield up the possession on the ground that it

is not consistent with their duty to do so. *Doe* v. *Taylor*, 2 Stark. 535. Proof of actual occupation is not in all cases essential, but proof of other acts of ownership, such as the receipt of rent, the cutting down of trees and the like, and of declarations made on the part of the defendant, may be sufficient. *Stanley* v. *White*, 14 East, 333; *Crane* v. *Ghirardelli*, 44 Cal. 235. Thus in Virginia, it is sufficient to show that he is setting up a claim, and making entries and surveys. *Harvey* v. *Tyler*, 2 Wall. 328. But an entry by a purchaser under a contract of sale, for the purpose of cutting timber, is not such a possession as will sustain ejectment by the vendor claiming the contract to be fraudulent. *Corley* v. *Pentz*, 76 Penn. St. 57.

When the action relates to vacant or uninclosed lands of which neither party is in actual possession, the theory upon which ejectment is based does not apply; and lest the owner of such lands should be left without remedy, many of the States have provided by law that the action may be brought against any one claiming title or some interest in, or exercising acts of ownership over such lands. This is the case in New York, Michigan, Indiana, Illinois, Wisconsin, Minnesota, Iowa, Pennsylvania, Oregon, Virginia, Colorado, Florida, Tennessee and Mississippi. But this claim must be a serious intentional claim of title or interest in the land, not a mere idle declaration to that effect, and the acts of ownership must be such as would naturally spring from such a claim. *Banyer* v. *Empie*, 5 Hill, 48.

§ 8. **Showing ouster or dispossession.** In order to sustain ejectment in certain cases which will be hereafter noticed, the plaintiff must show an actual ouster or dispossession. It is, therefore, important to understand clearly what constitutes such an ouster. The definition usually given is, "the putting out of a freeholder. A species of injury to things real, by which the wrong-doer gains actual occupation of the land, and compels the rightful owner to seek his legal remedy in order to gain possession." It differs from disseizin only in that it may be right or wrong, while disseizin always implies a wrongful expulsion. *Doe* v. *Thompson*, 5 Cow. 371. Actual disseizin is a wrongful entry by one man upon the land of another, with intent to usurp the possession, and the retaining of the same by expelling or at least keeping out the true owner. The disseizor thereby obtains a seizin, which may be the foundation of title by adverse possession. The facts essential to create such a title are, an actual occupancy, clear, definite, positive and notorious, which must be continued, adverse and exclusive during the whole period prescribed by statute, and must be with intent to claim title to the land occupied.

A notorious and exclusive possession of land without right, or an en-

try under a void grant, or under a deed from one having no title, will constitute a disseizin. *Melvin* v. *Proprietors of Locks, etc.*, 5 Metc. 15; *Jackson* v. *Huntington*, 5 Peters, 402. And it makes no difference that the entry and possession may be without the owner's knowledge. *Poignard* v. *Smith*, 6 Pick. 172; *Brown* v. *King*, 5 Metc. 173. An entry upon land with claim of title under a parol gift, and a subsequent exclusive possession, also amount to a disseizin (*Sumner* v. *Stevens*, 6 Metc. 337); and so does the holding of possession by adjoining owners up to a line assumed by them to be the true division line between their lands. *Boston, etc., R. R. Co.* v. *Sparhawk*, 5 Metc. 469.

Building a fence around the land of another, or erecting buildings thereon, is an ouster or disseizin (*Jackson* v. *Warford*, 7 Wend. 62; *Cutter* v. *Cambridge*, 6 Allen, 20); but neither inclosure nor building are essential, since other acts of ownership which, from their nature, indicate a notorious claim of property, done within the knowledge of an adverse claimant and without interruption or adverse entry by him, have the same effect. *Faught* v. *Holway*, 50 Me. 24. Where the property is so situated as not to admit of permanent, useful improvement, neither actual occupation, cultivation or residence are necessary, but it is sufficient if the party has exercised public acts of ownership such as he would not over property he did not own. 3 Washb. Real Prop. 134; *Ewing* v. *Burnet*, 11 Peters, 41.

Causing land to be run around by a surveyor, and trees to be marked on the lines, and occasionally cutting grass on a part, do not amount to an ouster. *Kennebec Purchase* v. *Springer*, 4 Mass. 416; *Smith* v. *Burtis*, 6 Johns. 218; *Slice* v. *Derrick*, 2 Rich. 627; *O'Hara* v. *Richardson*, 46 Penn. St. 391. Nor does an entry on wild land under a deed from one who has no title, although it is formally executed and recorded, unless it is followed by visible occupancy or exclusive possession (*Bates* v. *Norcross*, 14 Pick. 224; *Lane* v. *Gould*, 10 Barb. 254); nor the making of a lop or slash fence around woodland, without the knowledge of the owner (*Coburn* v. *Hollis*, 3 Metc. 125; *Jackson* v. *Schoonmaker*, 2 Johns. 230); nor an entry upon such land and cutting off wood and timber for sale or use, clearing a part and marking a line by lopped trees, although with the knowledge of the owner. *Slater* v. *Jepherson*, 6 Cush. 129; *Stevens* v. *Hollister*, 18 Vt. 294; *Stevens* v. *Tuft*, 11 Gray, 35.

In some cases, where the act by which the owner's dominion over and free enjoyment of real property has been disturbed or interfered with is equivocal, and not sufficient as a foundation for title by adverse possession, the land-owner may, at his election, treat it as a disseizin, and abandoning the possession he may have his remedy as in case of an ac

tual disseizin. *Prescott* v. *Nevers*, 4 Mason, 326; *Smith* v. *Burtis*, 6 Johns. 215; *Slater* v. *Rawson*, 6 Metc. 439. Thus, where a tenant at will makes a lease for years, or any other tenant in possession conveys a greater estate than he has, or alienates, surrenders, or otherwise determines his particular estate before the contingency happens upon which the estate is to vest in remainder, the landlord may at his election consider it a disseizin. *Jackson* v. *Davis*, 5 Cow. 123; *Taylor* v. *Horde*, 1 Burr. 60.

These decisions are sufficient to illustrate the doctrine of disseizin or ouster as applied to ordinary cases, in very few of which it is now necessary to prove an actual ouster or dispossession.

In California, a plaintiff claiming by possession alone must show an actual ouster (*Watson* v. *Zimmerman*, 6 Cal. 46); and in Louisiana it is held that a plaintiff in a possessory action must prove that he had the real and actual possession of the property at the instant his rights were invaded, and that he has suffered a real disturbance, either in fact or in law. *Millard* v. *Richard*, 13 La. Ann. 572; *Deuchatell* v. *Robinson*, 24 id. 176. By statute in several of the States, a plaintiff suing for dower before admeasurement must show that the defendant denied her right, or did some act amounting to such a denial.

But it is only in cases which arise between coparceners, tenants in common, and joint tenants that such proof is ordinarily deemed essential. It may be stated as a general rule, that one coparcener, tenant in common or joint tenant suing another in ejectment, must show an actual ouster, or some act by the defendant which amounts to an actual denial of the plaintiff's right. *Edwards* v. *Bishop*, 4 N. Y. 61; *Ricard* v. *Williams*, 7 Wheat. 59; *Johnson* v. *Swain*, Busb. 335; *Cross* v. *Robinson*, 21 Conn. 379; *Murray* v. *Hall*, 7 C. B. 441; *Silloway* v. *Brown*, 12 Allen, 37; *Newell* v. *Woodruff*, 30 Conn. 492; *Peterson* v. *Laik*, 24 Mo. 541. The reason of this rule is, that the law presumes the tenant in possession to be holding honestly, for himself and his cotenants, until the contrary is shown. Stronger evidence of an intent to hold adversely must, therefore, be shown in such a case than is required in ordinary cases. Of this rule numerous illustrations might be given, but a few will suffice. Mere possession of the premises by one of several co-tenants, though undisturbed and continuing for a long course of years, without payment of rent, is not an ouster of his co-tenants unless there is evidence of a use inconsistent with the rights of the atter, and of an intention to exclude them. *Butler* v. *Phelps*, 17 Wend. 642; *Shumway* v. *Holbrook*, 1 Pick. 117. Merely taking all the crops is not such an ouster (*Silloway* v. *Brown*, 12 Allen, 37; *Murray* v. *Hall*, 7 C. B. 441); but an appropriation by one of the whole prof-

its under a claim of exclusive right, or with palpable intent to possess the whole exclusively, is an ouster. *Alexander* v. *Kennedy*, 19 Tex. 488; *Bennet* v. *Bullock*, 35 Penn. St. 364; *Owen* v. *Morton*, 24 Cal. 376.

Merely taking a deed of the entire estate from a stranger and putting it on record is not an ouster of the co-tenant, nor notice to him of an adverse claim of ownership, such as will work an ouster of his seizin; but taking and holding possession under such a deed, or under a deed from one coparcener and her husband, purporting to convey the whole estate in fee, does amount to such an ouster. *Clark* v. *Vaughan*, 3 Conn. 191; *Bigelow* v. *Jones*, 10 Pick. 161; *Gill* v. *Fauntleroy*, 8 B. Monr. 177. So, also, an entry under a deed from one of two tenants in common of that half of the land which was occupied by him, and the refusal of the grantee to yield to the co-tenant his share thereof on demand, is an ouster. *Marcy* v. *Marcy*, 6 Metc. 360.

It has been held that, for one tenant in common to oust another, he must do such acts as would be an ouster of a landlord by a tenant, or of any one to whom he stood in a fiduciary relation. *Holley* v. *Hawley*, 39 Vt. 525, 534; *Roberts* v. *Morgan*, 30 id. 319. An unequivocal and notorious denial of the rights of a co-tenant, and a refusal to pay him any part of the profits, is a disseizin. *Abercrombie* v. *Baldwin*, 15 Ala. 363. The refusal of one tenant in common to admit the right of his co-tenant after the demise laid has been held to be an ouster. *Hargrave* v. *Powell*, 2 Dev. & Batt. 97. A claim by the tenant in possession of the entire interest, exclusive of his co-tenant, and his refusal to yield possession to the latter on demand, is evidence of an actual ouster. *Doe* v. *Bird*, 11 East, 49; *Siglar* v. *Van Riper*, 10 Wend. 415. A refusal to admit the co-tenant to possession or to account to him for profits received, on demand made, is indeed the most satisfactory evidence of an intent to exclude him. The denial by the co-tenant, in his answer to an action brought against him to recover the common land, of all right, title and interest of the plaintiff therein has been held in New York to be a confession of ouster. *Clason* v. *Rankin*, 1 Duer, 337. If one who derives his title from five of the heirs of a deceased person claims the whole premises as his own, and offers to sell them, asserting that the remaining heirs have received their share of the consideration and ought to sign the deed, that amounts to a denial of the rights of the latter heirs. *Valentine* v. *Northrop*, 12 Wend. 494. If one joint tenant holds adverse possession from the commencement of his co-tenant's claim, that is a disseizin. *Brock* v. *Eastman*, 28 Vt. 658. If tenants in possession

continue to hold after their co-tenants have been turned out, their holding is adverse. *Barret* v. *Coburn*, 3 Mete. (Ky.) 510.

An entry as a purchaser under a judgment, with claim of right, is an ouster (*Fosgate* v. *Herkimer Manuf., etc., Co.*, 9 Barb. 287); and possession under an invalid sale by a guardian, claiming under the guardian's deed, is a sufficient ouster to enable heirs to maintain ejectment. *Wilkinson* v. *Filby*, 24 Wis. 441.

The erection of a building for his own use by one tenant in common on the common land is an ouster to that extent. *Bennett* v. *Clemence*, 6 Allen, 18; *Stedman* v. *Smith*, 8 El. & Bl. 1; *Erwin* v. *Olmsted*, 7 Cow. 229. Pulling down a house and laying a railway on the common land is also an ouster of the co-tenant. *Doe* d. *Wawn* v. *Horn*, 5 M. & W. 564. But the building of a fence around such land by the husband of one tenant in common as her agent is not an ouster of her co-tenants, even though he claims to occupy to the exclusion of the latter, or asserts his wife's claim in a manner inconsistent with their rights. *Yager* v. *Larsen*, 22 Wis. 184.

Whether the ouster was commenced by a tortious entry or not, the proper remedy is ejectment; and the right to employ that remedy is not now affected, as it formerly was, by a descent cast upon the heir of a disseizor who died in possession.

§ 9. **What title not sufficient.** The general rule has already been stated, that an equitable title will not sustain ejectment, and the exceptions to it have also been noted, but a few cases will be given illustrating the rule. *Chapin* v. *First Universalist Soc.*, 8 Gray, 580. One who claims only an equitable estate cannot recover in ejectment if the legal estate be outstanding. *Thompson* v. *Lyon*, 33 Mo. 219. Nor can he maintain the action where he relies upon his mere equitable title, and does not seek the possession as incidental to a specific performance or other equitable relief, and the defendant is not the party who is bound to convey to him. *Peck* v. *Newton*, 46 Barb. 173. He must first apply to a court of chancery to establish his title before he can maintain the action. *Eels* v. *Day*, 4 Conn. 95. If he claims that the legal or paper title is based on fraud, he must first attack that title and have it declared void by an action in chancery. *Walker* v. *Kynett*, 32 Iowa, 524; *Rountree* v. *Little*, 54 Ill. 323.

One who takes a deed as security for advances, agreeing to reconvey on repayment thereof, is a mere equitable mortgagee, and cannot maintain ejectment against the widow of the party with whom such agreement was made. *Carr* v. *Carr*, 4 Lans. 314; 52 N. Y. (7 Sick.) 251. So, also, where he takes an assignment of the legal title as security. *Murray* v. *Walker*, 31 N. Y. (4 Tiff.) 399.

The grantor of a conveyance in trust to secure payment of debts has merely an equitable title to the premises conveyed, and his grantee by a deed subsequent to the trust deed has no better title, and neither of them can maintain the action. *Heard* v. *Baird*, 40 Miss. 793.

A vendee of land, with no other title than that conferred by the bond of his vendor, cannot recover in ejectment against one who has subsequently acquired the legal title. *Trammell* v. *Simmons*, 17 Ala. 411. Although such vendee may have paid the whole purchase-money, he has a mere equitable title, and must go into equity to divest his vendor's legal title, and until he has a conveyance of that title he cannot recover in ejectment. *Moody* v. *Farr*, 33 Miss. 192. A mining corporation formed by persons owning mining ground, each of whom agrees to convey his interest in such ground to the company in consideration of stock, does not, by the mere agreement, without such conveyance, acquire any title which will enable it to recover the land in ejectment. *San Felipe Mining Co.* v. *Belshaw*, 49 Cal. 655. Where lands were conveyed to a married woman having children, and whose husband went into bankruptcy under the act of congress of 1841, before the statute of 1845 took effect, they cannot be recovered by writ of entry in the name of husband and wife, without a reconveyance by the assignee. *Parks* v. *Tirrell*, 3 Allen, 15.

A parol gift of land, though founded upon the consideration of marriage with the donor's daughter, and accompanied by possession, will not enable the donee to maintain ejectment against the personal representatives of the deceased donor. *Conn* v. *Prewitt*, 48 Ala. 636.

Default in the payment of a mortgage to the State loan commissioners when demanded will not entitle them to maintain the action, although the statute declares that upon such default they shall have an indefeasible estate in the lands, etc. *York* v. *Allen*, 30 N. Y. (3 Tiff.) 104.

A sheriff's sale, without a deed, conveys only an equitable title. *Edwards* v. *Miller*, 4 Heisk. 314. It will not sustain ejectment. Ib.; *Crawford* v. *Green*, 1 Harr. (Del.) 464. Under a statute which declares that the title of the execution debtor shall not be divested until the expiration of a specified time, when a deed shall be given if the land is not redeemed, the sheriff's certificate of sale does not invest the purchaser with sufficient title to maintain ejectment. *Dean* v. *Pyncheon*, 3 Chand. 9.

A purchaser at sheriff's sale, under a judgment for a mechanic's lien on a building, under the laws of Pennsylvania, of the equitable ownership of the defendant cannot maintain ejectment against the owner of the land on which the building stands. *Carson* v. *Boudinot*, 2 Wash

C. C. 33. In Illinois, a sheriff's deed which does not state that the land was appraised and is not supported by proof that it was appraised, will not enable one claiming under it to sustain the action. *Curtis* v. *Doe*, Breese, 139.

A deed which shows on its face that it is an assignment in insolvency under the statutes of New York will sustain an ejectment by the assignee, though not accompanied by proof that jurisdiction of the proceedings was obtained as prescribed by the statute. *Rockwell* v. *Brown*, 54 N. Y. (9 Sick.) 210.

A son, remaining in possession of premises after his father's decease under a mere family arrangement and without legal proceedings had thereon, cannot maintain ejectment. *Boardman* v. *Bartlett*, 6 Vt. 631.

One whose maintenance is charged upon land devised to her mother in fee takes no legal interest in the lands or title to the possession, and cannot recover them by ejectment against those to whom her mother has devised them subject to her support. *Donihue* v. *Rankin*, 31 Mich. 148.

A first location of mining lands is not of itself sufficient to sustain such action. *Penn., etc., Co.* v. *Owens*, 15 Cal. 135.

Ejectment cannot be supported in the United States courts on an incomplete title, such as a mere entry at the land office, before the patent issues (*Hooper* v. *Scheimer*, 23 How. [U. S.] 235; *Wilcox* v. *Jackson*, 13 Peters, 498); nor on warrants for land, or New Madrid certificates, on which no patent has issued. *Fenn* v. *Holme*, 21 How. (U. S.) 481. In Pennsylvania, a warrant for land, without survey or payment of purchase-money, does not give sufficient title for that purpose (*Copley* v. *Riddle*, 2 Wash.C. C. 354; *Du Bois* v. *Newman*, 4 id. 74); nor is a mere survey of lands in the Virginia military district sufficient. *Dresback* v. *McArthur*, 7 Ham. 146.

The surrender and cancellation of a deed once delivered does not revest the legal title in the grantor, so as to enable him to maintain ejectment. *Cranmer* v. *Porter*, 41 Cal. 462; vol. 2, 509.

A grantee, whose grantor had neither title nor possession when he conveyed, has no title, and cannot maintain the action against one in possession. *Tabb* v. *Baird*, 3 Call. 475.

A claimant under a judgment in partition which is void, cannot recover his undivided share without showing a regular title, as if no judgment had been entered. *Jackson* v. *Brown*, 3 Johns. 459.

Ejectment cannot be maintained on a title founded upon a deed in trust to sell lands and pay over the proceeds to the grantor, because such deed does not create a valid trust, or vest a legal title in the

grantee. *Heermans* v. *Robertson*, 3 Hun, 464; 5 N. Y. Sup. 596; 64 N. Y. (19 Sick.) 332. A conveyance from one who had been many years in possession, but had no deed, does not confer a legal title, and will not sustain the action. *Eels* v. *Day*, 4 Conn. 95. A mere naked possession is not sufficient as against one who ousts that possession under a legal title. *Tucker* v. *Phillips*, 2 Metc. (Ky.) 416.

Grantees of lands adjoining a turnpike road, although they have been in possession for more than seventy years, have no such title or possession of the road as will enable them, upon its discontinuance, to maintain ejectment for the half adjoining their respective lands. *Dunham* v. *Williams*, 37 N. Y. (10 Tiff.) 251; 4 Trans. App. 209.

A tax deed, executed by the treasurer who made the sale after the expiration of his term of office, is not such *prima facie* title as will sustain the action. *Hoffman* v. *Bell*, 61 Penn. St. 444.

ARTICLE V.

WHO CAN MAINTAIN THE ACTION.

Section 1. In general. It may be stated as a general rule that any one who owns land, or an interest therein in fee, for life, or for years, and has an immediate right of possession, can maintain ejectment therefor. By statute, in several of the American States, the equivalent terms, "any person having a valid subsisting interest in real property and a right to the immediate possession thereof," are used; and in New York it is still further provided that the action may be maintained by "any person claiming an interest therein, in fee or for life, either as heir, devisee, or purchaser." This general rule is, however, subject to some modifications and limitations, which will sufficiently appear in the following statement of the particular parties who can maintain the action:

Assignees of a bankrupt or of an insolvent debtor are usually, under the laws applicable to such cases, vested with the title to the real as well as the personal property of the debtor, by mere force of their appointment, and may maintain ejectment therefor. *Doe* v. *Spencer*, 2 Carr. & Pa. 79; *Doe* v. *Land*, 3 Dowl. & Ry. 509; *Doe* v. *Abrahams*, 1 Stark. 305; *Barstow* v. *Adams*, 2 Day, 70 Such assignees may even eject the bankrupt himself from premises conveyed to a third party in trust for him, and by such third party assigned to them. *Cooper* v. *Lands*, 14 W. R. 610; 14 L. T. (N. S.) 287. By the English bankrupt law, estates tail and copyholds do not vest in the assignees unless duly assigned; and a term for years held by the bankrupt does not pass to them by the assignment unless they elect to accept it, but

remains in the bankrupt. In case of insolvency, however, such a term will vest absolutely in the provisional assignee and not revert to the insolvent.

The assignee of a lease can maintain ejectment even against his assignor, where the latter has covenanted to surrender on a certain day, but refuses to do so, notwithstanding he may not have paid what he agreed to before that day. *Strong* v. *Garfield*, 10 Vt. 497.

An award of arbitrators has been held in England to give good title by estoppel to the party in whose favor it is made, so that he can maintain the action against the other party. *Doe* v. *Rosser*, 3 East, 15. This rule would probably prevail in this country, except where submissions of land titles are prohibited by statute, as in New York and some of the other States; but even there the prohibition has been held to apply only to the submission of legal titles. *Olcott* v. *Wood*, 14 N. Y. (4 Kern.) 32.

A *cestui que trust* can in some cases maintain ejectment for the trust lands in his own name. *Kennedy* v. *Fury*, 4 Dall. 72. This he may do after the purposes of the trust deed are satisfied, even though the legal title still remains in the trustee (*Doggett* v. *Hart*, 5 Fla. 215; *Hopkins* v. *Ward*, 6 Munf. 38); but generally to enable him to sue, the circumstances must be such that a surrender or conveyance of the legal estate to him can be reasonably presumed (*Obert* v. *Bordine*, 1 Spencer [N. J.] 394); and in that case he can maintain the action against his trustee. *Brown* v. *Combs*, 5 Dutch. 36. It has been held that where the *cestui que trust* paid the consideration for the land, he would be considered as possessing, not only the equitable, but also the legal estate, so far as to enable him to sue for its recovery. *North Hempstead* v. *Hempstead*, 2 Wend. 109. But the contrary is held in *Moore* v. *Spelman*, 5 Denio, 225. In any case, he must be entitled to the possession of the premises or he cannot sue therefor. *School Directors* v. *Dunkleberger*, 6 Penn. St. 29; *Presb. Cong.* v. *Johnston*, 1 Watts & Serg. 9. A *cestui que trust* who assents to a purchase of the trust property by the trustee at his own sale, accepting the proceeds, is estopped thereby from alleging that the sale is void, and cannot recover possession on that ground. *Johnson* v. *Bennett*, 39 Barb. 237.

In England, the action can be maintained by the cognizor or conusee of a statute merchant or statute staple, to recover the possession of land of his debtor which has been delivered to him to hold until satisfaction of his claim out of the rents and profits; also, by a copyholder for lands held by that title, or by his lessee; and by the lord of the manor against a copyholder upon forfeiture of his estate; also by a lay impropriator for tithes (Adams on Eject. 109, 111, 126); but the estates

on which such rights of action are based probably have no existence in this country.

The rights of coparceners will be considered in connection with those of tenants in common.

A corporation, either aggregate or sole, can maintain an action to recover its real property. *Henley* v. *Bank of Mobile*, 16 Ala. 552. A corporation aggregate is defined to be a "collection of individuals united in one body, under such a grant of privileges as secures a succession of members without changing the identity of the body, and constitutes the members, for the time being, one artificial person or legal being, capable of transacting some kind of business like a natural person." Burrill's Law Dict. These artificial bodies are distinguished as civil, eleemosynary, spiritual or lay, according to the purposes for which they are formed; and the statutes under which they are organized usually confer upon them ample power to protect by action their rights in all property which they are authorized to acquire. See vol. 2, 304–352.

A State is, in the highest sense of the term, a corporation. Counties, towns, parishes and the like, upon which limited corporate powers are conferred by law, are called *quasi* corporations, but they possess all such powers as are necessary to protect and recover their own property. Thus, a State has undoubted power to sue in its corporate capacity for the protection of its own title and rights in real estate. *James Riv. & Kan. Co.* v. *Thompson*, 3 Gratt. 270. But it has been held in several cases that a State cannot be disseized, and, therefore, cannot maintain ejectment. 3 Washb. Real Prop. 173; *State* v. *Arledge*, 1 Bail. 551; *Jackson* v. *Winslow*, 2 Johns. 80.

A municipal corporation can maintain ejectment to recover possession of a street, to the soil of which it has the legal title (*Mayor, etc., of Havana* v. *Steamboat Co. of Georgia*, Charlt. 342; *San Francisco* v. *Sullivan*, 50 Cal. 603); or for land dedicated to the use of the public, as a public building, or a public square. *Gardiner* v. *Tisdale*, 2 Wis. 153; *Winona* v. *Huff*, 11 Minn. 119. It is otherwise in Michigan, by statute. *Grand Rapids* v. *Whittlesey*, 33 Mich. 109.

In England, the right to hold and to sue for lands and buildings belonging to the parish is vested by statute in the church wardens and overseers of the poor, as a body corporate. To constitute the body contemplated by that statute, it has been held that there must be two overseers and one or more church wardens (*Woodcock* v. *Gibson*, 4 Barn. & Cres. 462; *Phillips* v. *Pearse*, 5 id. 433); and it is also held, that all buildings, lands and hereditaments previously held in trust for or belonging to a parish became thereby vested in such wardens and

overseers, notwithstanding any leases thereof granted before the statute was enacted, and without regard to the purposes for which they were held. *Doe* v. *Hiley*, 10 Barn. & Cres. 885; *Doe* v. *Terry*, 4 Ad. & Ell. 274. In a few of the American States, officers of churches, such as church wardens or deacons, either by themselves or in connection with some other class of officers, are invested with corporate capacity to take and hold real estate, and transmit it to their successors in office; and under such statutes those officers may have ejectment to recover the possession of the land so held by them. Generally, however, in this country, the property intended for the use of religious bodies or the support of the ordinances of religion is held by religious corporations, organized under special charters, or under general acts upon that subject, and possessing most of the powers of other private corporations; and such corporations may, like those of a civil nature, maintain actions in their corporate names for the protection or recovery of property held by them.

By statute in some of the States, overseers of the poor, and other like public officers, have capacity to maintain ejectment. Thus, in Pennsylvania, if a plaintiff in ejectment dies a pauper, the overseers of the poor have a right to be substituted in his place. *Jester* v. *Overseers, etc.*, 11 Penn. St. 540.

A corporation sole is defined to be "a corporation consisting of one person only, and his successors in some particular station, who are incorporated by law in order to give them legal capacities and advantages which as natural persons they could not have, the most important of which is perpetuity." Corporations of this kind are of rare occurrence in this country, though recognized in some of the States, and authorized by their laws to bring ejectment for lands belonging to them. Bishops and deans in England, and ministers seized of lands in right of the parish in this country, are instances of corporations sole. *Ante*, Vol. 2, 306, 307.

A devisee of a freehold interest in lands may immediately, and without any possession, maintain ejectment for the lands devised; but a legatee of a term of years must first obtain the assent of the executors. Co. Litt. 140; *Young* v. *Holmes*, 1 Strange, 70. Upon obtaining such assent, the legatee becomes vested absolutely with the legal estate, and may maintain the action against the executors as well as against a stranger. *Doe* v. *Guy*, 3 East, 120.

In Massachusetts, it has been held that the devisee of vacant land has, by operation of law without an entry, such seizin as will enable him to maintain a writ of entry. *Green* v. *Chelsea*, 24 Pick. 71.

An executor, to whom lands in Kentucky are devised by a will made

in Virginia, takes them as an individual and not as executor, and may bring ejectment therefor without taking out letters testamentary in the former State. *Doe* v. *McFarland*, 9 Cranch, 151.

This right of action in a devisee exists only where it is obvious that no action of the probate court in ordering a division or assigning the land can become necessary, and there is no pretense that the executor has any lien upon the land, or so long a time has elapsed that his lien will be presumed satisfied. *Abbott* v. *Pratt*, 16 Vt. 626.

In Maine it has been held that the owner of the equity of redemption of real estate may maintain a real action for its possession against any one except the mortgagee and those claiming under him (*Stinson* v. *Ross*, 51 Me. 556; *Huckins* v. *Straw*, 34 id. 166); and in Massachusetts it is held that a writ of entry will lie by the former owner of lands which have been sold for non-payment of taxes, after tender of a sufficient sum to redeem them under the statute. *Rand* v. *Robinson*, 11 Cush. 289.

Executors and administrators do not ordinarily have sufficient title to or right of possession in lands held in fee by their testators or intestates to enable them to maintain ejectment therefor, but they may do so for lands of which he died possessed for a term of years. *Duchane* v. *Goodtitle*, 1 Blackf. 117; *Doe* v. *Porter*, 3 Term R. 13; *Slade's Case*, 4 Coke, 72. Thus, an executor or administrator of a tenant for years or from year to year has an interest in the lands and a right of possession, and can maintain an action therefor. *Doe* v. *Spore*, 3 Term R. 13; *Mosher* v. *Yost*, 33 Barb. 277.

In several of the States executors and administrators have by statute the exclusive right of possession of the lands of the decedent during the settlement of the estate, and where that is the case they can maintain ejectment while that right continues. *Kline* v. *Moulton*, 11 Mich. 370; *Meeks* v. *Hahn*, 20 Cal. 621. In Alabama, Arkansas and Georgia, the administrator can maintain such action if the decedent could have done so. *Russell* v. *Erwin's Adm'r*, 41 Ala. 292; *Menifee's Adm'r* v. *Menifee*, 8 Ark. 9; *Carruthers* v. *Bailey*, 3 Kelly, 105. In Pennsylvania, executors may do so if they are authorized by will to sell specific land, or if such land is directed by will to be sold and no one is designated to exercise the power. *Chew's Executors* v. *Chew*, 28 Penn. St 17; *Kirk* v. *Carr*, 54 id. 285. In England, it is held that an executrix may recover lands of her testator on a demise laid before probate granted (*Roe* v. *Summerset*, 2 W. Bl. 694; 5 Burr. 2608); and two or three co-executors may recover on a joint demise. *Doe* v. *Wheeler*, 15 M. & W. 623; 16 L. J. Exch. 312.

A person attainted of felony may, in England, before office found in

favor of the king, convey a title to lands which will sustain an action of ejectment. *Doe* v. *Pritchard*, 5 Barn. & Ad. 765. In this country, generally, no forfeiture of estate follows the commission of any crime, however heinous it may be; consequently a sentence to imprisonment in a State prison for any term less than life, although it usually suspends the civil rights of the convict during the term of imprisonment, probably would not affect the title of real estate conveyed by him before conviction and sentence. An alien may purchase and hold lands until office found, and may maintain ejectment. *Jinkins* v. *Noel*, 3 Stew. (Ala.) 60.

A grantee of the first grass, or of the herbage, pasturage or pannage of land, or of a boilary of salt, of mines or a right to mine, or of a building on another's land, has an interest in the land, and can usually maintion ejectment therefor. A grantee of the Commonwealth can sue in ejectment, before actual entry. *Innes* v. *Crawford*, 2 Bibb, 412. The grantee of a conditional fee can maintain the action before breach of the condition. *Candee* v. *Burke*, 1 Hun, 546; 4 N. Y. Sup. (T. & C.) 143. And so may one who, as a consideration for a grant of land, has agreed to support his grantor, and who has hitherto performed and is still ready to perform his agreement. *Spalding* v. *Hallenbeck*, 30 Barb. 292; 39 id. 79; 35 N. Y. (8 Tiff.) 204. The grantee of a trustee can recover the land by such action, although the conveyance was unauthorized. *Canoy* v. *Troutman*, 7 Ired. 155. A grantee, by deed containing covenants of warranty, can maintain ejectment against his grantor, without previous demand of possession or notice to quit. *Dodge* v. *Walley*, 22 Cal. 224. And the grantee of one whose land has been sold on execution can recover the possession from the purchaser if such sale was void. *Addison* v. *Crow*, 5 Dana, 271.

Under the law generally prevailing in this country, which makes a deed of land, at the time in the actual adverse possession of another, void, the grantor still retains the legal title and may sue in ejectment to recover the possession thereof. *Jackson* v. *Vredenbergh*, 1 Johns. 159; *Williams* v. *Jackson*, 5 id. 489; *Livingston* v. *Proseus*, 5 Hill, 526; *Dearmond* v. *Brooking*, 37 Ga. 5. But in Pennsylvania the grantee may maintain such action (*Dillon* v. *Dougherty*, 2 Grant's Cas. 99); and in Georgia he may use the name of the grantor for that purpose. *Thompson* v. *Richards*, 19 Ga. 594.

A general guardian of an infant, having control of his lands, or a guardian in socage, or one upon whom like powers are conferred by statute, may maintain ejectment for the lands of his wards. *Wade* v. *Cole*, Ld. Raym. 130; *Holmes* v. *Seely*, 17 Wend. 75. Where a tenant *pur autre vie* holds over his term, an action in favor of the infant

reversioner can be brought only by the guardian in socage or the general guardian. *Seaton* v. *Davis*, 1 N. Y. Sup. (T. & C.) 91.

The heirs of one who died seized of land may maintain ejectment therefor against a mere wrong-doer. *Carruthers* v. *Bailey*, 3 Kelly, 105; *Tappscott* v. *Cobbs*, 11 Gratt. 172. So, also, the heir of the devisee of the person in possession. *Asher* v. *Whitlock*, L. R., 1 Q. B. 1. An heir, on whom a contingent remainder in a copyhold has devolved, may bring ejectment without admittance, his title being complete upon the death of his ancestor. *Doe* v. *Rolfe*, 3 Nev. & Per. 648.

Where considerable time has elapsed since the death of the ancestor, and no administration has been taken out, and none is required because there are no debts, the heir can maintain ejectment (*Updegraff* v. *Trask*, 18 Cal. 458); but not without entry on the premises after the death of his ancestor. *Soto* v. *Kroder*, 19 Cal. 87. In Vermont the heirs may recover lands to which their ancestor had title, if no administrator is appointed; and in case administration has been granted, payment of debts will be presumed after the lapse of nine years. *Buck* v. *Squiers*, 22 Vt. 484; *Austin* v. *Bailey*, 37 id. 219. Even though the ancestor died out of possession, his heirs may maintain the action. *Webster* v. *Webster*, 53 Penn. St. 161; *Mason* v. *Walker*, 14 Me. 163. The heirs at law of a deceased intestate can maintain ejectment to recover land, as against a mere wrong-doer. *Carruthers* v. *Bailey*, 3 Kelly (Ga.), 105.

An heir at law, if entitled to possession, may have ejectment against the widow in possession after the expiration of her quarantine, unless it appears that such land has been assigned to her as dower, or she is authorized by some law to retain possession. *Moore* v. *Gilliam*, 5 Munf. 346; *Chapman* v. *Armistead*, 4 id. 382. The contrary is held in Pennsylvania and perhaps some other States. *Gourley* v. *Kinley*, 66 Penn. St. 270. After the death of a widow to whom dower has been assigned in lands of which her husband died seized, the heirs at law of the husband are *prima facie* entitled to recover possession thereof. *Brown* v. *Colson*, 41 Ga. 42.

The heirs of a patentee of lands may maintain ejectment therefor, although an agent made the entry in the name of the patentee after his death. *McClairen* v. *Wicker*, 8 Ark. (3 Eng.) 192. The heirs of a surviving trustee can also maintain the action (*Crunkleton* v. *Evert*, 3 Yeates, 570); and so may the heirs of one who has granted land in fee, subject to a rent charge, with right of re-entry for non-payment of rent, if the rent is not paid. *Cruger* v. *McLaury*, 41 N. Y. (2 Hand) 219.

An action of partition, which is not revived against the heirs of a

defendant after his death, will not affect their rights, but they can sue for their undivided interests in the land. *De Mill* v. *Port Huron & Co.*, 30 Mich. 38. If a tenant in tail aliens in fee, his issue may maintain ejectment without entry after his decease. *Den* v. *Robinson*, 2 South, 689.

Except in certain cases to be noticed hereafter, it is not necessary for all the heirs to join, but one of several may sue in his own name. *Dowd* v. *Gilchrist*, 1 Jones' Law, 353.

Where land is conveyed to husband and wife, they hold by entireties, with right of survivorship; yet, it is generally conceded that the husband, holding in right of his wife, can maintain ejectment therefor without joining her as plaintiff (*Jackson* v. *Leek*, 19 Wend. 339); but in New Hampshire they must join in such a case. In Georgia, a husband may, after the death of his wife, and without administration on her estate, sue for and recover her land, although he had never reduced it to possession. *Prescott* v. *Jones*, 29 Ga. 58.

An Indian can maintain ejectment for land which is reserved to him by treaty. *Coleman* v. *Doe*, 4 Smedes & M. 40.

In respect to the lands of an infant, we have the anomaly of two parties, either of whom may bring an action for their recovery, irrespective of the other. As we have seen, the general guardian or the guardian in socage has that right. The infant himself may also exercise it, by bringing an action in his own name by his next friend or guardian *ad litem*. Adams on Eject. 67; *Heft* v. *McGill*, 3 Penn. St. 256.

An infant who has conveyed lands during his minority may, on coming of age, recover them back by ejectment; but, in order to do so, he must, before suit brought, disaffirm the conveyance by some notorious act, such as making an entry upon the lands and executing a second deed to a third person, or giving notice of his intention to disaffirm and demanding possession. *Voorhies* v. *Voorhies*, 24 Barb. 150.

An action to recover the real estate of an insane person must, except where otherwise provided by statute, be brought in the name of such person himself, and cannot be maintained by his guardian or committee. *Petrie* v. *Shoemaker*, 24 Wend. 85; *Lane* v. *Schermerhorn*, 1 Hill, 97; *Allen* v. *Ranson*, 44 Mo. 263.

Loan commissioners in New York can remove by ejectment a party who holds over after a notice from them to quit. *Candee* v. *Hayward*, 37 N. Y. (10 Tiff.) 653; 5 Trans. App. 194.

The owner of land dedicated or appropriated to public use may maintain ejectment against a permanent incumbrancer. *Weisbrod* v.

Chi., etc., R. R. Co., 21 Wis. 602; *Lozier* v. *N. Y., etc., R. R. Co.*, 42 Barb. 465; *Wright* v. *Carter*, 3 Dutch. (N. J.) 76.

A petitioner in insolvency can maintain ejectment to recover possession of a homestead. *Moore* v. *Morrow*, 28 Cal. 552.

One who has had peaceable possession of land and has been evicted therefrom can maintain ejectment against the wrong-doer who has no better title. *Clute* v. *Voris*, 31 Barb. 511; *Doe* v. *Dyeball*, 3 C. & P. 610; M. & M. 346; *Davison* v. *Gent*, 1 H. & N. 744; 26 L. J. Exch. 122; 3 Jur. (N. S.) 342; *Asher* v. *Whitlock*, 11 id. 925; 35 L. J. Q. B. 17; *Shumway* v. *Phillips*, 22 Penn. St. 151; *Tapscott* v. *Cobbs*, 11 Gratt. 172

Under the laws of Wisconsin a pre-emptor of swamp lands may maintain ejectment therefor. *Manny* v. *Smith*, 10 Wis. 509.

A principal whose agent has attempted to sell his land for a nominal price in fraud of his rights can recover the same by ejectment. *Meade* v. *Brothers*, 28 Wis. 689.

A purchaser at a sheriff's sale on execution can maintain ejectment therefor against the judgment debtor, if he was in possession at the time of the levy and sale. Adams on Eject. 69; *Doe* v. *Mitchell*, 6 Ala. 70; *Snavely* v. *Wagner*, 3 Penn. St. 275; *Carson* v. *Boudinot*, 2 Wash. C. C. 33; *Snowden* v. *McKinney*, 7 B. Monr. 258; *Hamilton* v. *Jack*, 1 Sneed, 81; *ante*, art. 4, § 2. But one in possession of land, when sued in ejectment by a purchaser under judgment and execution against him, may show that he never had such title to the premises as was the subject of sale under legal process. *Cook* v. *Webb*, 18 Ala. 810.

Where a debtor's interest in leasehold premises is sold on execution, the purchaser, after his title is perfected under the sale, may maintain ejectment, not only against the debtor, but against a usurious assignee of his lease or his subsequent assignee. *Mason* v. *Lord*, 40 N. Y. (1 Hand) 476. One who purchases lands sold on execution against a mortgagor may recover the same from such mortgagor by ejectment. *Martin* v. *Shelton*, 2 B. Monr. 63. A purchaser of the lands of a reversioner on execution against him can maintain such action against the heirs of the life tenant holding over after the death of such tenant, without notice to quit, even though the execution was voidable for irregularity. *Nims* v. *Sabine*, 44 How. 252. If a husband's interest in his wife's lands of which he is in possession is sold under a decree for the enforcement of a mechanic's lien, the purchaser may recover the possession thereof in ejectment against the husband. *Martin* v. *Pepall*, 6 R. I. 92.

A purchaser of mortgaged lands on foreclosure can maintain ejectment therefor against one who has purchased from the mortgagor

(*Hart* v. *Blackington*, Wright, 386); or against one who has disseized him. *Clute* v. *Voris*, 31 Barb. 511.

A purchaser of land at a sale for taxes, who actually occupies part of the tract described in his deed, can maintain the action against a mere intruder or trespasser upon any part of the premises, even though the sale was irregular and consequently the deed was void. *Thompson* v. *Burhans*, 61 Barb. 260.

A reversioner can, after the expiration of the preceding term for years, recover from a canal company lands taken by it without compensation, by agreement with the tenant for years and with the consent of the reversioner. *Patrick* v. *Beaufort*, 4 Eng. L. & E. 496; 4 Exch. 498.

The assignee of a reversion has the same right of entry for conditions broken as his assignor. Adams on Eject. 72.

A tenant for years can maintain ejectment to recover possession of the land demised. *Olendorf* v. *Cook*, 1 Lans. 37. One who receives a lease to operate for oil, and takes such actual possession of the land as is necessary for that purpose, can maintain ejectment against his lessor for a wrongful ouster. *Karns* v. *Tanner*, 66 Penn. St. 297.

The fact that an assignment of a lease was obtained by false representations will not avoid it so as to prevent the assignee from suing in ejectment. *Austin* v. *Taite*, 8 Ir. C. L. 35. Except where otherwise provided by statute, a lease of a house will not be avoided so as to deprive the tenant of a right of action for its possession, by the facts that he procured it by fraudulent representations, and has turned the house into a brothel. *Feret* v. *Hill*, 15 C. B. 207; 2 C. L. R. 1366.

In Indiana a tenant at will can maintain ejectment. *Buntin* v. *Doe*, 1 Blackf. 27. The obligee of a bond for a title to lands, who has a right to the possession until the money is due, though a tenant at will, can maintain ejectment against an intruder who enters after he has removed. *Haythorn* v. *Margerem*, 3 Halst. Ch. 324.

A tenant for life can, of course, maintain ejectment, his estate being a freehold.

Tenants in common, coparceners and joint tenants can maintain ejectment, but the rule as to their joinder or severance in the action is not uniform. At common law tenants in common could not join as plaintiffs, and that rule still prevails to some extent in this country. *Heatherly* v. *Weston*, 2 Wils. 233; *Gaines* v. *Buford*, 1 Dana, 483; *Wathen* v. *English*, 1 Mo. 746

It has, however, been modified by statute in England as well as here generally, so that they may sue either jointly or severally.

Elliss v. *Elliss*, El. Bl. & El. 81; 4 Jur. (N. S.) 1181; 27 L. J. Q. B. 316; *Alford* v. *Dewin*, 1 Nev. 207; *Hicks* v. *Rogers*, 4 Cranch, 165; *Innis* v. *Crawford*, 4 Bibb, 241; *Jackson* v. *Bradt*, 2 Caines, 174; *Doe* v. *Butler*, 3 Wend. 149.

As a rule, joint tenants and coparceners must join in real actions against third parties, their interests being joint. 1 Chit. Pl. 55, 56. One parcener cannot sue alone under a power of re-entry reserved in a lease. *Doe* v. *Lewis*, 5 A. & E. 277; 2 H. & W. 162. In Massachusetts, one joint tenant cannot alone maintain a writ of entry to foreclose a mortgage. *Webster* v. *Vandeventer*, 6 Gray, 428.

But this rule has also been changed very generally by statute in this country, so as to allow all, or any one or more, to sue, according as the action relates to the whole or to their separate shares. Ejectment will lie on the several demises of three joint tenants. *Doe* v. *Fenn*, 3 Camp. 190.

It has been held in California, that one tenant in common may sue for and recover the whole premises, as against every one but his co-tenant; the rights of the co-tenants being provided for by the judgment in such a case. *Hardy* v. *Johnson*, 1 Wall. 371; *Collier* v. *Corbett*, 15 Cal. 183; *Trent* v. *Reilly*, 35 id. 129. In Connecticut a surviving partner may recover the land of the firm in ejectment. *Robinson* v. *Roberts*, 31 Conn. 145.

As against third parties wrongfully in possession, one coparcener may sue on her separate demise (*Jackson* v. *Sample*, 1 Johns. Cas. 232); and one tenant in common may sue separately and recover his share of the common property. *Smith* v. *Starkweather*, 5 Day, 207; *Craig* v. *Taylor*, 6 B. Monr. 457; *Mobley* v. *Bruner*, 59 Penn. St. 481; *Tarver* v. *Smith*, 38 Ala. 135.

One who holds as tenant in common under a title bond may recover the severed part from a mere trespasser. *Hooper* v. *Hall*, 30 Tex. 154.

One joint tenant may also recover his share by ejectment. *Roe* v. *Lonsdale*, 12 East, 39.

It is a maxim of the common law, that the possession of one joint tenant, coparcener or tenant in common is *prima facie* the possession of his co-tenant also (*Ford* v. *Grey*, Salk. 285; *Doe* v. *Keen*, 7 Term R. 386); and this presumption is the foundation of the rule, which almost universally prevails, that one such tenant cannot maintain ejectment against his co-tenant, without actual ouster or its equivalent. In cases arising between such parties, it is usual also to require stronger proof of ouster than in other cases where no such rule prevails; but, that once established, the rights of one joint tenant, co-

parcener or tenant in common will be enforced as well against his co-tenant by whom he is ousted as against a stranger. Whenever, therefore, there is either an actual dispossession by the co-tenant, or such acts in denial of his right as amount to a disseizin, or establish an adverse possession, the one so dispossessed may maintain ejectment to recover his share. *Johnson* v. *Swain*, Busb. 335; *Edwards* v. *Bishop*, 4 N. Y. 61; *Ricard* v. *Williams*, 7 Wheat. 59; *McCown* v. *Hannah*, 3 Oreg. 302; *Obert* v. *Bordine*, 1 Spenc. 394; *Harmon* v. *James*, 7 S. & M. 111; *Chiles* v. *Conley*, 9 Dana, 385; *Carpenter* v. *Thayer*, 15 Vt. 552; *Barnitz* v. *Casey*, 7 Cranch, 456. A mere silent possession by one, accompanied by no act which can amount to an ouster or give notice to the co-tenant that his possession is adverse, is not sufficient. *McClung* v. *Ross*, 5 Wheat. 116. The refusal of the one in possession to admit the right of his co-tenant has been held to be a sufficient ouster for that purpose (*Hargrave* v. *Powell*, 2 Dev. & Batt. 97); or his claiming to hold under a deed of the whole (*Clark* v. *Vaughan*, 3 Conn 191); or his compelling payment of all the rent to himself (*Doe* v. *Mitchell*, 3 Moore, 229; 1 B. & B. 11); or the purchase in, of an outstanding title by one of the heirs of a decedent, who was also executor, and holding in opposition to his co-tenants. *Weller* v. *Auble*, 58 Penn. St. 410.

A grantee of a specific quantity of land in a larger tract is a tenant in common with his grantor, and may maintain ejectment against the latter if ousted by him. *Lawrence* v. *Ballou*, 37 Cal. 518.

A joint tenant may, by an open and notorious possession for twenty years adverse to his co-tenants, acquire a title which will enable him to sustain ejectment against them. *Russell* v. *Marks*, 3 Mete. (Ky.) 37.

Trustees to whom land is devised or conveyed for the purposes of a trust which is not executed by the statute of uses, are usually vested with the legal title, and can, therefore, maintain ejectment for the trust property. A trustee to receive rents and profits, and pay them over or apply them to the use of a person named, has such legal title and right of action. *Jones* v. *Say & Seall*, 8 Vin. Abr. 262; *Doe* v. *Ironmonger*, 3 East, 533; *Jefferson* v. *Morton*, 2 Saund. 11, note; *Gregory* v. *Henderson*, 4 Taunt. 772; *McLean* v. *McDonald*, 2 Barb. 534. Where land was devised to a daughter in fee, but authority was given to trustees to receive, hold and manage until such daughter became of age, it was held in Massachusetts that the trustees did not have a freehold, and, therefore, could not maintain a writ of entry, but might an ejectment. *Fay* v. *Taft*, 12 Cush. 448.

A trustee of a term to satisfy creditors may have ejectment against

a tenant in possession under an agreement for a lease, made before the grant of the term, of which the trustee had no notice. *Goodtitle* v. *Way*, 1 Term R. 735.

A trustee in whom the legal title to lands was vested for the benefit of a married woman does not lose that estate upon her death, but may afterward recover possession by ejectment. *Slevin* v. *Brown*, 32 Mo. 176.

A trustee can even sue his *cestui que trust* in ejectment, the latter when in possession being considered as his tenant (*Beach* v. *Beach*, 14 Vt. 28; *Jackson* v. *Pierce*, 2 Johns. 226; *Baker* v. *Nall*, 59 Mo. 265); unless the circumstances are such that a conveyance may be presumed. *Matthews* v. *Ward*, 10 Gill & Johns. 443.

It was formerly held that a surrender or conveyance of the legal estate might be presumed, after the purposes of the trust were satisfied; or when the party beneficially interested was in possession; or when it was for the interest of the owner of the inheritance that it should be so considered; or when equity would compel a conveyance (*Doe* v. *Staple*, 2 Term R. 684; *Doe* v. *Davies*, 1 Q. B. 430; *Doe* v. *Williams*, 2 Mees. & Welsb. 749; *Doe* v. *Wrighte*, 2 Barn. & Ald. 710; *Doe* v. *Slade*, 4 Term R. 682); but this doctrine is no longer recognized in England, nor probably to any great extent in this country. At all events it has been held that the trustee still retains the legal title, and can maintain ejectment against third parties after the purposes of the trust have been satisfied (*Hopkins* v. *Stephens*, 2 Rand. 422; *Moore* v. *Burnet*, 11 Ohio, 334); and that a wrong-doer cannot set up against him the title of the *cestui que trust*. *Hunt* v. *Crawford*, 3 Penn. St. 426. Even one to whom the trustee has conveyed, in breach of his trust, may maintain ejectment in his own name. *Canoy* v. *Troutman*, 7 Ired. 155; *Taylor* v. *King*, 6 Munf. 358; *Reece* v. *Allen*, 5 Gilm. 241.

In Pennsylvania, a vendor can compel the execution by his vendee of articles of agreement for the purchase of land, and enforce such agreement by ejectment, he being considered a trustee for the vendee until he has executed a deed (*Tyson* v. *Passmore*, 2 Penn. St. 122; *Brawdy* v. *Brawdy*, 4 id. 158); and one who has purchased and paid for land for the benefit of another, letting him into possession, but retaining the title as security, can, upon the same principle, enforce the payment of the purchase-money in such an action. *Reed* v. *Murray*, 11 Penn. St. 334.

A vendor, whose own agent, having procured his appointment under a pretense of friendship, has indirectly purchased for himself the property he was authorized to sell, at an inadequate price, can recover it

back on tendering the purchase-money. *Rankin* v. *Porter*, 7 Watts, 387.

In Pennsylvania, the beneficial owner of land may maintain ejectment in the name of the warrantee, although the latter has no beneficial interest and does not consent. *Campbell* v. *Galbreath*, 1 Watts, 70; *Ross* v. *Barker*, 5 id. 391.

As to where a widow may sue for her dower, see § 5 of this article.

In England, wherever a custom exists in a manor that a widow shall enjoy customary lands of which her husband died seized, as of free bench, during widowhood, she can maintain ejectment therefor without admittance, after challenging her right and praying to be admitted, even against the lord. *Goodwin* v. *Longhurst*, Cro. Eliz. 535.

In Missouri, a widow who has been evicted from her husband's mansion and plantation belonging thereto, before assignment of dower, may regain possession by ejectment. *Stokes* v. *McAllister*, 2 Mo. 163.

A widow may recover by ejectment real estate which was conveyed to her during coverture as her separate estate, without reference to any administration on her husband's estate. *Hart* v. *Robertson*, 21 Cal. 346.

In New York, a married woman having a separate estate can maintain such action against any one but her husband, in her own name, without joining him as co-plaintiff. *Darby* v. *Callaghan*, 16 N. Y. (2 Smith) 71.

As to joinder of plaintiffs, the general rule is that only those persons may join whose interests are joint. The exception of tenants in common has already been noticed. Two persons claiming the whole of a parcel of land by title hostile to each other, cannot join as plaintiffs against the person in possession, setting forth their separate titles. *Hubbell* v. *Lerch*, 58 N. Y. (13 Sick.) 237.

An executor in his representative capacity cannot join with the devisees under the will to recover lands of the testator. *Tarver* v. *Smith*, 38 Ala. 135. Nor can a widow join with the heirs to recover lands of the deceased. *Pringle* v. *Gaw*, 5 Serg. & Rawle, 536. But where several heirs become entitled to recover lands for the breach of a condition subsequent, all must join in an action therefor. *Cook* v. *Wardens, etc., of St. Paul's Church*, 5 Hun, 293.

Whether an action of ejectment will abate upon the death of the plaintiff, or a transfer of his interest, and how or by whom it may be revived or continued, are matters which are usually regulated by statute. Under the old practice, the real plaintiff was the so-called lessee, and not the lessor, and ordinarily the action would not abate by the death of the latter, yet, where a real person was named as lessor, his

death before the commencement of the action has been held good ground for a nonsuit, and his death pending the action has been held to abate it. *Howard* v. *Gardiner*, 3 Harr. & McHen. 98.

In many of the American States it is provided by statute that an action of ejectment shall not abate by the death of the plaintiff, but may be continued in the name of the successor in title.

In Pennsylvania, if such action is brought in the name of one as trustee for another after the trust has expired, the name of the trustee may be stricken out, leaving it to proceed in the name of the beneficiary. *Westcott* v. *Edmunds*, 68 Penn. St. 34. And one who acquires the plaintiff's title pending the suit may proceed to judgment in the name of the original plaintiff. *Longbine* v. *Piper*, 70 Penn. St. 378. He may do the same in New York, and in some other States. *Van Rensselaer* v. *Owen*, 48 Barb. 61; 33 How. Pr. 12.

§ 2. **Landlord against tenant.** The peculiar relations existing between landlord and tenant, and the special rules applicable to the action of ejectment when that relationship exists between the parties, render it not only proper but even necessary to treat the subject, so far as it relates to them, in a separate section. As the very idea of a tenancy implies a right of possession in the tenant, so the right to deprive him of that possession implies a termination of the tenancy; and it is only upon such termination that the landlord can sustain ejectment. When a tenancy will terminate, or how it shall be brought to an end, involves an inquiry into the nature of the different kinds of tenancy, because all are governed by the same rules in that respect. In this section, therefore, we will consider, as briefly as may consist with the importance of the subject, how the relation of landlord and tenant may be created; the nature, continuance and termination of tenancies, and under what circumstances the landlord may maintain ejectment to recover possession of the demised premises.

And, first, we remark that a tenancy arises upon some contract or agreement, express or implied, between the owner and the person in possession of land, or between the parties from or under whom they claim; and it exists to some extent in all cases where the possession has been obtained under such a contract or agreement. Usually a rent is reserved in contracts for a tenancy, but that is not essential to their existence.

By the very act of accepting or holding a possession so obtained, the tenant admits the title of his landlord, and he is thereby estopped from contesting it in a suit for the possession, and the latter is relieved from the necessity of proving it. This is perhaps the most striking peculiarity of the action between such parties, inasmuch as the most import-

ant question involved in actions between other parties does not arise, but the only questions to be determined are, has the term of the tenant expired by its own limitation, or has it been lawfully terminated by the act of the landlord.

The most common mode of creating the relationship of landlord and tenant is by an express lease, either verbal or written, which fixes the terms of the letting, and will govern in the determination of the rights of the parties. Such a lease may be for any length of time, less or greater, unless there be some statute limiting the terms which may be so created. By the statute of frauds in many of the American States, a verbal lease for more than one year is expressly declared to be void, but in others a longer term is permitted.

Except where restricted by some statute, the parties to a lease may stipulate in it as to when or upon what contingency it shall teminate, and under what circumstances either party shall have the right to terminate it at an earlier date; and the tenancy will cease upon the expiration of the time or the happening of the particular event specified in the lease, or upon the exercise by a party of the right thereby given him to bring it to an end.

When the power of determining the tenancy is expressly reserved in the lease, the exercise of that power is of course dependent upon the terms of the reservation. When there is no reservation the law implies one according to the nature of the holding. If a person is let into possession as tenant under a general holding, the law construes it to be a tenancy from year to year, and authorizes either party to terminate it by a notice to quit.

Where one person occupies the land of another by his permission, the law will presume that he so occupies in subservience to the title of the owner, and as his tenant.

A tenancy at sufferance exists when a tenant has come rightfully into possession of lands by permission of the owner, and continues to occupy after the time for which by such permission he had a right to do so. Tenants *pur autre vie*, who hold over after the death of the *cestui que vie*, — tenants for years, whose terms have expired, — tenants at will, whose estates have been determined by alienation, by the death of the lessor, or by the happening of some contingent event on which the determination thereof depended, — under-tenants, who hold over after the expiration of the terms of the original lessees — grantors, who hold over after the day when they agreed to give possession, and mortgagors, who hold after a sale of the mortgaged premises by the mortgagee or his assigns, under a power of sale in the mortgage, are all tenants at sufferance. Co. Litt. 57; *Jackson* v. *Parkhurst*, 5 Johns.

128; *Kinsley* v. *Ames*, 2 Metc. 29; *Benedict* v. *Morse*, 10 id. 223; *Creech* v. *Crockett*, 5 Cush. 133; *Simkin* v. *Ashurst*, 1 Crompt. M. & R. 261. Any one who continues in possession without agreement or the consent of the owner, after the determination of the particular estate by which he originally gained it, is liable to an action of ejectment without notice to quit. *Livingston* v. *Tanner*, 14 N. Y. (4 Kern.) 64; *Smith* v. *Littlefield*, 51 N. Y. (6 Sick.) 539. But if the landlord permits the tenancy at sufferance to continue for such a length of time as to imply assent, it may, in some cases, become a tenancy from year to year. So, also, if the parties agree, the one to hold and the other to permit him to hold possession, the tenancy immediately ceases to be one at sufferance and becomes one at will, or from year to year. The payment and receipt of rent for the time held over has the same effect. *Russell* v. *Fabyan*, 34 N. H. 223.

A tenancy at will formerly meant a holding subject to be turned out at the pleasure of the landlord; but tenancies of that exact nature are not now known, unless created by express agreement. What is now so called is scarcely distinguishable from a mere permissive occupation. If a tenancy be created by express words clearly showing it to be the intention and agreement of the parties that it shall continue only so long as both parties please, it is a proper estate at will, although rent be reserved payable by the year or part of year. *Richardson* v. *Landgridge*, 4 Taunt. 128; *Harrison* v. *Middleton*, 11 Gratt. 527; *Sullivan* v. *Enders*, 3 Dana, 66. A mortgage in which the mortgagor agrees to become the tenant of the mortgagee in the mortgaged premises, during the will and pleasure of such mortgagee at a certain rent, payable quarterly, creates a tenancy at will (*Doe* v. *Cox*, 13 Q. B. 122; 11 Jur. 991; 17 L. J. Q. B. 3); and a mortgage in which the mortgagee covenants not to sell under the power of sale until twelve months after notice, and that the mortgagor shall quietly enjoy as tenant at will of the mortgagee, paying a yearly rent, has the same effect. *Doe* v. *Davies*, 7 Exch. 89; 21 L. J. Exch. 60.

An implied tenancy at will, in the modern sense, arises when a tenant is in possession of premises with the privity and consent of the owner, but no express tenancy or certain term has been created, nor any thing been done by the owner to expressly recognize him as a tenant. *Doe* v. *Quigley*, 2 Camp. 505; *Right* v. *Beard*, 13 East, 210.

As instances of such tenancy, we have the cases of a person who is let into possession pending a treaty for a purchase or a lease (*Gould* v. *Thompson*, 4 Metc. 224; *Dean* v. *Comstock*, 32 Ill. 180; *Proprietors, etc.*, v. *McFarland* 12 Mass. 325; *Hammerton* v. *Stead*, 3 B. & C. 478; *Riseley* v. *Ryle*, 11 M. & W. 16; *Goodtitle* v. *Herbert*, 4 Term R.

680; *Doe* v. *Browne*, 8 East, 165); or under an agreement for a lease, in which case that tenancy will continue until he pays rent for a year or some portion of a year having reference to a year (*Braythwayte* v. *Hitchcock*, 10 M. & W. 494; 6 Jur. 976), but will terminate on the death of the lessor (*Manchester* v. *Doddridge*, 3 Ind. 360); or where he goes in under a lease which is void (*Doe* v. *Stennett*, 2 Esp. 717); or is admitted by trustees into a chapel and house as minister of a dissenting congregation (*Doe* v. *McKaeg*, 10 B. & C. 721); or is permitted by a householder to occupy rent free *Rex* v. *Jobling*, Russ. & Ry. 525; *Rex* v. *Collett*, id. 498. One who, after the expiration of a tenancy for a term, continues in possession, negotiating for a new one, is also a tenant at will. *Den* v. *Rawlins*, 10 East, 261; *Emmons* v. *Scudder*, 115 Mass. 367. A widow of a tenant from year to year who is suffered to occupy the premises, paying rent to the lessor, is strictly a tenant at will of the administrator of her deceased husband. *Doe* v. *Wood*, 14 M. & W. 682; 6 Jur. 1060; 15 L. J. Exch. 41. A grantor, who continues in possession after delivery of his deed to the purchaser, and a judgment debtor, who continues after the sale on a *fi. fa.* to hold by consent of the purchaser, are also tenants at will. *Currier* v. *Earl*, 13 Me. 216; *Nichols* v. *Williams*, 8 Cow. 13.

Taking the key of a house for the purpose of occupying it, without actual occupation, is held to imply a tenancy. *Little* v. *Martin*, 3 Wend. 219 A mere occupation with the owner's concurrence will inure as a tenancy from year to year or at will, according to circumstances, determinable at the pleasure of the owner.

Even an implied tenancy at will must be determined by a demand of possession, breaking off the negotiation, or otherwise, before the landlord can maintain ejectment. An entry by the landlord to cut and carry away stone has been held sufficient for that purpose. *Turner* v. *Bennett*, 9 M. & W. 643. Demand of rent, accompanied by a notice that unless paid the landlord will take measures to recover the possession, is also sufficient (*Doe* v. *Price*, 2 M. & Scott, 464; 9 Bing. 355); and such demand will have that effect though made to the wife of an under-tenant on the premises. *Roe* v. *Street*, 4 N. & M. 42. If in any such case the landlord receives rent while such tenant is in possession, or does any act amounting to an acknowledgment of an existing tenancy, the law declares the tenancy to be one from year to year. *Silsby* v. *Allen*, 43 Vt. 172. For the purposes of a notice to quit, a tenancy at will is generally deemed one from year to year. *Phillips* v. *Covert*, 7 Johns. 4.

A tenancy for years is a lease or demise for a term certain, whether it be for one or more years. A tenancy for half a year, a quarter of a

year, a month or a week, is governed by substantially the same rules.

Such a tenancy is created by the act of the parties, and not by the act of the law. The relation of landlord and tenant thereby created, attaches to all persons who succeed to the possession of the premises through or under the first tenant, and they are bound by the covenants of the original lease. *Patten* v. *Deshon*, 1 Gray, 327; *Torrey* v. *Wallis*, 3 Cush. 442.

A general occupation is now held, in England, to inure as a tenancy from year to year, determinable by notice to quit.

A similar rule on the subject has been generally adopted in this country (*Chamberlain* v. *Pratt*, 33 N. Y. [6 Tiff.] 47); and a general tenancy by a parol lease, whereby rent is reserved, is to be considered as a lease for a year, and if the tenant is allowed to hold without notice to quit into the second year, it will be so considered for such second year, and so on indefinitely.

A tenant for years holding over his term becomes a tenant from year to year.

A tenant who holds over after the expiration of his lease, even though for but a short time, by permission, is in on the conditions of the original lease, if the landlord receives from him rent subsequently accruing. *Bishop* v. *Howard*, 2 Barn. & Cres. 100. If let into possession under a void lease, payment of rent will create a tenancy from year to year, which will be governed by the covenants and conditions of such lease, although it will not make that valid (*Doe* v. *Bell*, 5 Term R. 471; *Doe* v. *Terry*, 4 Ad. & Ell. 274); and the lease, though by parol, will regulate the terms of the tenancy as to rent and time of year when the tenant must quit. *Schuyler* v. *Leggett*, 2 Cow. 660. A person who is let into possession under a valid agreement for a future lease, and pays rent which is received by the lessor, becomes a tenant from year to year, according to the conditions of such agreement, although the lease is never executed. *Doe* v. *Amey*, 12 Ad. & Ell. 476. Generally, any thing transpiring between the landlord and the tenant which really indicates the intention of the parties to create a tenancy, or amounts to an acknowledgment of the relationship of landlord and tenant, will be regarded as sufficient to establish the tenancy.

Where a tenant holds over after the expiration of his term without any new agreement, the landlord may at his election treat him either as a tenant from year to year, on the terms of the original lease, or as a trespasser. *Schuyler* v. *Smith*, 51 N. Y. (6 Sick.) 309; *Thomas* v. *Packer*, 1 H. & N. 669; 3 Jur. (N. S.) 143; 26 L. J. Exch. 207; *Hunt* v. *Wolfe*, 2 Daly, 298. If the tenancy in such a case was for

less than a year, the new tenancy will be upon the same terms. *Noel* v. *McCrory*, 7 Goldw. 623.

If one person puts another in possession of premises with a view to a future tenancy or purchase, or under circumstances of a similar nature, he creates a tenancy, although he may have done no other act acknowledging that relation. But a purchaser who is put into possession after part payment, under an agreement that he shall have possession until a certain day, paying rent meanwhile, and if he does not then pay the balance of the purchase-money, shall forfeit the installment paid and not be entitled to a conveyance, cannot claim the rights of a tenant from year to year, if he fails to make such payment (*Doe* v. *Sayer*, 3 Camp. 8); nor can one who makes such contract while in possession, and fails to fulfill. *Whiteside* v. *Jackson*, 1 Wend. 418.

Putting a person in possession of a house, under an agreement that he shall occupy and enjoy it until reimbursed for repairs to be made by him, makes him a tenant from year to year. *Thomas* v. *Wright*, 9 Serg. & R 87.

Receiving or distraining for rent accruing after the end of the term makes the tenant one from year to year; and if the landlord says or does nothing, his acquiescence in the tenancy may probably be inferred from mere lapse of time. *Conway* v. *Starkweather*, 1 Denio, 113. A delay of three months and twelve days before attempting to remove the tenant has been held not sufficient to establish such acquiescence. *Rowan* v. *Lytle*, 11 Wend. 616.

If the grantee of an annuity charged on certain lands distrains upon the lessee of his grantor for arrears, and the latter thereupon attorns and pays rent to him, he becomes a tenant from year to year of such annuitant until the arrears are paid. *Doe* v. *Boulter*, 6 Ad. & Ell. 675; 1 N. & P. 650.

If a tenant from year to year dies, his interest usually vests in his personal representatives, and they will hold upon the same terms as he did. *Doe* v. *Porter*, 3 Term R. 13; *Mackay* v. *Macreth*, 4 Doug. 213; 2 Chit. 461.

A mortgagor is not in the position of a yearly tenant to his mortgagee, nor are his lessees who were let into possession subsequent to the mortgage and without the privity of the mortgagee; but, where a mortgagee is permitted by law to maintain ejectment on default of the mortgagor, he may do so against him or such lessees without notice to quit or demand of possession. *Doe* v. *Giles*, 5 Bing. 421.

Neither is a judgment debtor, or his lessee subsequent to the judgment, a tenant from year to year of the tenant by *elegit*, or entitled to notice to quit. *Doe* v. *Wharton*, 8 Term R. 2.

Having sufficiently considered the mode of creating the different tenancies and their distinctive characters, we are next to inquire as to their termination and the landlord's right of possession arising thereupon. The general rule, applicable to all tenancies created by leases which fix the time for their termination at a day certain, or on the happening of a particular event, is, that the landlord's right to possession and to bring ejectment accrues immediately upon the expiration of that time, or the happening of that event, and he need not give notice to quit or demand possession (*Bedford* v. *McElherron*, 2 Serg. & R. 49; *Den* v. *Adams*, 7 Halst. 99; *Roe* v. *Ward*, 1 H. Bl. 97; *Rich* v. *Keyser*, 54 Penn. St. 86; *Evans* v. *Hastings*, 9 id. 273); and the same rule will apply even though the lease be void, or there be a mere agreement for a lease, under which the tenant has entered and occupied for a full term. *Doe* v. *Stratton*, 4 Bing. 446.

The ordinary rules for determining the time of the commencement and termination of a lease when not otherwise regulated by statute or custom are, that a year shall consist of three hundred and sixty-five days; a half year of one hundred and eighty-two days; and a quarter year of ninety-one days; the additional day of leap years being merged in or counted as one with that which precedes it. A month is a calendar and not a lunar month. *Anonymous*, Lofft. 275. When a lease is to run from or after a particular day, that day is excluded (*Sheets* v. *Selden's Lessee*, 2 Wall. 177; *Cornell* v. *Moulton*, 3 Denio, 16; *Doe* v. *Snowdon*, 2 W. Bl. 1225; *Presbrey* v. *Williams*, 15 Mass. 193); and where it is to commence from the date, or from the day of the date, the question whether the day of the date is to be included or excluded is to be determined by the intention of the parties, as gathered from the instrument. *Pugh* v. *Leeds*, Cowp. 714; *Wilcox* v. *Wood*, 9 Wend. 346. In New York it has been held that a lease to commence *on* the first day of May in one year and terminate *on* the first day of May in another year, will expire at noon of the last-named day, and an assignment of such lease running *to* the first day of May would expire at midnight of April 30th. *People* v. *Robertson*, 39 Barb. 9. In England, a lease to commence "from the 25th of March then next for twenty-one years fully to be completed and ended," is held not to end until the last moment of March 25th of the last year. *Ackland* v. *Lutley*, 1 P. & D. 636; 9 A. & E. 879. A tenancy from year to year is considered as commencing every year. *Tomkins* v. *Lawrence*, 8 C. & P. 729; *Gandy* v. *Jubber*, 10 Jur. (N. S.) 652; 33 L. J. Q. B. 151; 5 B. & S. 78.

In order to enable a landlord to maintain ejectment against a tenant, the term must have actually expired according to the provisions of the lease under which the premises are held, or the landlord must be in a

situation to and must actually put an end to the tenancy. *Jackson* v. *Hughes*, 1 Blackf. 421; *Penn* v. *Divellin*, 2 Yeates, 309; *Stoffit* v. *Troxell*, 8 Watts & S. 340; *Evans* v. *Hastings*, 9 Penn. St. 273.

The right to put an end to a tenancy under an express lease before the time therein limited for its termination ordinarily arises upon the breach of a condition, or of a covenant to pay rent, or to do or to refrain from doing some other specified act. In some cases, however, a landlord has that right upon other grounds than the breach of an express condition or covenant. At common law the attempt of a life tenant to convey a greater estate than he had worked a forfeiture, but this ground of forfeiture is abolished by statute in England and in this country generally. It was formerly held, also, that a disclaimer by the tenant of his tenancy, or a denial of the landlord's title, forfeited his rights, and entitled the landlord to proceed against him immediately; but the weight of authority now is that a written lease cannot be forfeited by a mere verbal disclaimer or denial of the landlord's title. *De Lancy* v. *Ganong*, 9 N. Y. (5 Seld.) 9; *Doe* v. *Wells*, 10 Ad. & Ell. 427. A disclaimer of tenancy by a tenant from year to year is, however, eivdence of the cessation of the will of the tenant to continue, and has in some cases been held to render notice to quit unnecessary. An acknowledgment or affirmation by matter of *record* that the fee is in a stranger is still held sufficient to work a forfeiture of an estate for years. By statute in many of the States, a lessee will forfeit his lease by keeping a house of ill fame, and in some of them by keeping a gaming-house, and the landlord is authorized to sue immediately to recover the possession.

At common law the landlord always has the right to terminate a tenancy from year to year, by a notice to quit. As the subject of notices to quit will be fully treated in art. 8, no more need be said about it here.

The parties to a lease may insert in it whatever limitations, conditions or covenants they please, provided they are not contrary to law, nor repugnant to the nature of the estate or the principles of public policy.

The effect of a limitation is to terminate the estate when the period of limitation arrives, without entry or claim; but the breach of a condition subsequent, such as those usually inserted in leases, although declared a ground of forfeiture, does not defeat the estate until entry by the lessor or his heirs.

Both a condition and a covenant may be created by the same form of words. The distinctions between them are too nice to be fully explained in this article; but the most important one as respects the forfeiture of

the estate seems to be, that the landlord may have his remedy by ejectment for the breach of a condition, or other common-law forfeiture, but not for the breach of a mere covenant which is not accompanied by a clause for re-entry.

If a covenant affects the land demised during the term, as regards the mode of occupation, or is such as *per se* affects the value of the land at the end of the term, it is said to run with the land, and the forfeiture incurred by its breach may be enforced against the assigns of the lessee, or by the assigns of the lessor. *Mayor of Congleton* v. *Pattison*, 10 East, 130. A covenant by the lessee "for himself and his assigns" to build a wall on the premises is such a covenant (*Spencer's Case*, 5 Coke, 16); and so is one to supply the premises with good water during the term (*Jourdain* v. *Wilson*, 4 Barn. & Ald. 266); and one to insure against fire, in a case where the insurance money would be laid out in rebuilding. *Vernon* v. *Smith*, 5 Barn. & Ald. 1. A covenant by one who leases land from the owner of a mill, to grind all the corn growing on the land, at his mill, binds the assignee of the lease. *Vyvyan* v. *Arthur*, 1 Barn. & Cres. 410. But a covenant not to assign over the term does not run with the land, and the assignee of the lessor cannot take advantage of it. *Lucas* v. *How*, Raym. 250; *Collins* v. *Sillye*, 1 Styles, 265; *Pennant's Case*, 3 Coke, 64. See Vol. 2, 393–396.

The right to terminate a lease for non-payment of rent arises only upon express agreement. In order to secure that remedy, therefore, it has become almost a universal custom to insert in leases a covenant to pay rent at stated times with a right of re-entry in case of breach, or an equivalent condition making the failure to pay a ground of forfeiture. The common law was very nice and particular in its requirements as to the demand of rent necessary to take advantage of such a covenant or condition. The precise amount due, neither more nor less, must be demanded by the lessor, or by his agent duly authorized, on the precise day when it became due, or, if a failure to pay in a certain number of days after the day of payment gave the lessor the right to re-enter, then on the last of such days, and at a convenient time before sunset, on the demised premises and at the most notorious place thereon, whether any one was there or not, or if payable at any other place, then at such place. A failure in any of these particulars rendered the demand of no avail. *Roe* v. *Davis*, 7 East, 363; *Doe* v. *Paul*, 3 Carr. & P. 613; *Tenny* v. *Moody*, 3 Bing. 3; 11 Eng. C. L. 12; *Jackson* v. *Kipp*, 3 Wend. 230; *McCormick* v. *Connell*, 6 Serg. & R. 151; *Prout* v. *Roby*, 15 Wall. 471; *Gage* v. *Bates*, 40 Cal. 384. By statute 4 Geo. II, ch. 28, this demand for rent is dispensed with where there is six months' rent in arrear, and no sufficient distress upon the premises

to countervail such arrears, but in other cases all these formalities must still be complied with. The rules of the common law, as thus modified, prevail in this country generally, but have in New York and some of the other States been still further changed *Bradley* v. *Conner*, 5 Cranch's C C. 615; *Boyd* v. *Talbert*, 12 Ohio, 214. The remedy under the statutes of New York is applicable to all cases where there is a right to re-enter at common law. Either the grantor of a lease in fee reserving rent, or his assignee of the rent, may maintain ejectment upon non-payment of the stipulated rent. *Tyler* v. *Heidorn*, 46 Barb. 439; *Van Rensselaer* v. *Slingerland*, 26 N. Y. (11 Smith) 580. So, also, in New Jersey. *Farley* v. *Craig*, 6 Halst. 262.

But the statute does not give the right of action against those who succeed a delinquent tenant six months in arrears, unless, possibly, in case they take the entire premises for the whole of the remaining term. *Stuyvesant* v. *Grissler*, 12 Abb. (N. S.) 6.

As the landlord must have a subsisting right of entry in order to maintain ejectment, he cannot do so where he has already regained possession by summary proceedings.

In order to dispense with the demand under such statutes, strict evidence is required of the want of a sufficient distress on the premises, or at least of any which can be reached by the landlord. *Newman* v. *Rutter*, 8 Watts, 51; *Rees* v. *King*, 2 Ball & B. 514; *Doe* v. *Dyson*, 1 Mood. & M. 77; *Doe* v. *Franks*, 2 C. & K. 679; *Hammond* v. *Mather*, 3 F. & F. 151; *Price* v. *Worwood*, 4 H. & N. 512; 28 L. J. Exch. 329; *Wedgwood* v. *Hart*, 2 Jur. (N. S.) 288. Where the tenants of a large tract have partitioned among themselves without the privity of the landlord, it must appear that there was not a sufficient distress upon any part, before he can maintain ejectment for any part *Jackson* v. *Wyckoff*, 5 Wend 53 And although more than six months' rent is in arrear, he must show that there was not a sufficient distress to counteract the arrears for six months. *Doe* v. *Roe*, 9 Dowl. P. C. 548.

The abolition of distress for rent in New York does not take away the remedy by ejectment, but the statute requires fifteen days' previous notice in case there is a sufficient distress, in other cases, none. *Williams* v. *Potter*, 2 Barb. 316; *Mayor, etc., of N. Y.* v. *Campbell*, 18 id. 156.

At common law ejectment would lie after due demand, although there was a sufficient distress on the premises (*Van Rensselaer* v. *Jewett*, 2 N. Y. 141); and it is the usual remedy for the breach of condition as to the payment of rent after actual demand. *Morse* v. *Clayton*, 13 S. & M. 373. But the right to demand or notice may be waived by the stipulations of the lease, and in such case proof of demand, or

of want of sufficient distress, or of fifteen days' notice, are alike unnecessary. A covenant to "deliver up possession at the end of the term without further notice, and that the landlord may enter and repossess the premises at the end of the term, or at any time thereafter," is such a waiver. *McCanna* v. *Johnston*, 19 Penn. St. 434. So is a provision that "if the yearly rent is not paid at the time appointed the landlord may re-enter on the premises and repossess them" (*Hosford* v. *Ballard*, 39 N. Y. [12 Tiff.] 147); or a proviso that if rent is in arrear a certain number of days the lessor may re-enter, "although no legal or formal demand should be made" (*Harris* v. *Masters*, 2 Barn. & Cres. 490); or a covenant to "deliver up said house to the lessor on demand in case rent is not paid in advance, waiving all process of law" (*Simons* v. *Marshall*, 3 G. Greene, 502); or a stipulation that non-payment of rent for ten days shall give the lessor the right to sue without notice. *Eichart* v. *Bargas*, 12 B. Monr. 464.

It may also be forfeited, as before noticed, by the tenant's denying the title of the landlord. If a house is furnished to a hired man in addition to a specified sum per month as wages for his work, his ceasing to work forfeits his right to the house *McGee* v. *Gibson*, 1 B. Monr. 105.

Under a lease whereby the lessee covenants to pay the rent and also all taxes and assessments levied or assessed on the demised premises, and gives the lessor a right of re-entry on default to pay the stipulated rent, without demand, the latter may regain possession on the lessee's breach of the covenant as to taxes without any previous demand that he pay them. *Byrane* v. *Rogers*, 8 Minn. 281.

After a forfeiture has accrued for non-payment of rent it may be waived by the lessor by acts as well as by words, and it will be so waived and the right of action lost if he then does any act which amounts to an acknowledgment of a subsisting tenancy, as, if he receives rent due at a subsequent quarter (*Collins* v. *Hasbrouck*, 56 N. Y. [11 Sick.] 157; 15 Am. Rep. 407); or distrains for that in arrear, or receives such arrears, giving a receipt for it, in which he calls the party paying his tenant. *Jackson* v. *Sheldon*, 5 Cow. 448; *Coon* v. *Brickett*, 2 N. H. 163.

Some authorities hold that the receipt of rent is not a waiver unless such rent accrued after the forfeiture, and then it validates the lease only to the time of payment; but that, if the lessor, with a full knowledge of the forfeiture, accepts rent which fell due after that event, he waives such forfeiture. *Jackson* v. *Allen*, 3 Cow. 220. If he is ignorant of the forfeiture, the aceptance of rent is no waiver. *Jackson* v. *Brownson*, 7 Johns. 227. According to the old English authorities, in

the case of a lease for years the bare acceptance by the lessor, at a subsequent day, of the rent in respect of which the forfeiture accrued, although before suit brought, will not be a waiver, unless attended by other circumstances showing an intention to continue the tenancy; but in the case of a lease for life, the mere acceptance of such rent will affirm the lease. Adams on Eject. 173.

An unqualified demand for rent after a forfeiture is of itself a waiver of the forfeiture, although the rent is not paid. *Doe* v. *Birch*, 1 Mees. & W. 402. A suit for rent accrued after a breach of covenant of which the lessor had knowledge is also a waiver. *Dendy* v. *Nicholl*, 4 C. B. (N. S.) 376; 27 L. J. C. P. 220.

The act of distraining for rent is deemed a stronger acknowledgment of tenancy than a mere acceptance of rent, because the right to distrain ends with the tenancy; and, at common law, the taking of a distress is a waiver of the forfeiture although it be insufficient to satisfy the rent in arrear. *Jackson* v. *Sheldon*, 5 Cow. 448; *Dermott* v. *Wallach*, 1 Wall. 61. This rule no longer prevails in England, having been changed by statute. *Doe* v. *Johns*, 1 Stark. 411. Where an action was commenced on the 21st of July for rent due on the previous 24th of June, distraining afterward was held not to be a waiver (*Grimwood* v. *Moss*, 41 L. J. C. P. 239; L. R., 7 C. P. 360; 20 W. R. 972; 27 L. T. [N. S.] 268); and where there were two breaches, one for permitting a sale by auction on the premises, and the other for non-payment of rent, it was held that the receipt of rent paid into court was not a waiver of the first breach. *Toleman* v. *Portbury*, 20 W. R. 441; 26 L. T. (N. S.) 292; L. R., 7 Q. B. 344; 41 L. J. Q. B. 98; 2 Eng. 89.

The rules governing forfeitures for the non-performance of other covenants and conditions than those which relate to rent differ in many respects from those which we have just been considering. Provisos for re-entry for their non-performance are matters of contract, and should be construed fairly, the same as other contracts, without favor to either side. No strained or forced interpretation should be given to them, for the purpose of defeating their effect, nor are they to be construed with the strictness applicable to conditions at common law. The intent of the parties is to be sought from the whole lease, and carried into effect. As in other cases, every doubtful grant is to be construed in favor of the grantee. Adams on Eject. 176. The same rules of interpretation apply to agreements for leases which specify the covenants to be inserted.

And here it is proper to notice a distinction as to the consequences of a forfeiture upon breach of a condition, between leases for years and leases for lives. If a lease for years provides that in case of the breach

of a condition it "shall be null and void," or, "cease and determine," instead of the common form "that it shall and may be lawful for the lessor, in such case, to re-enter," etc., the lease will become absolutely void and determined by any breach, and not voidable merely, as in cases where the usual form is employed; but whatever may be the form used to express the condition in a lease for life, a breach of it renders the lease merely voidable, and it is not determined until the lessor re-enters. Adams on Eject. 197; *Pennant's Case*, 3 Coke, 64; *Stuyvesant* v. *Davis*, 9 Paige, 431; *Arnsby* v. *Woodward*, 6 Barn. & Cres. 519; *Parmelee* v. *Oswego, etc., R. R. Co.*, 6 N. Y. (2 Seld.) 74.

A stipulation that, on notice, the lessee will surrender and the lessor may enter on such parts of the premises as he may desire, is a condition, and the lessor by giving the notice puts an end to the term, and may enter upon the whole. *Gardiner* v. *Kennard*, 12 Q. B. 244; 64 Eng. C. L. 243.

What will be considered a breach of a covenant, entitling the landlord to recover the possession of the demised premises under a re-entry clause, cannot well be stated in general terms, but may be best illustrated by citing some of the cases on the subject.

The breach of a covenant not to allow alterations in the premises, or permit new buildings to be erected thereon without permission from the landlord, does not forfeit the lease, under a clause authorizing a re-entry if the tenant makes default in the performance of any of the clauses in the lease by the space of thirty days after notice. *Polk* v. *Marchetti*, 1 Barn. & Ad. 715; 20 Eng. C. L. 662.

A covenant that the lessee "shall not let, set or assign over," or shall not "let, set or demise," forbids an underlease as well as an assignment of the whole term. *Roe* v. *Harrison*, 2 Term R. 425; *Greenaway* v. *Adams*, 12 Ves. 395. A lease, containing a proviso for re-entry in case the tenant shall demise or let the premises, or any part thereof, for all or any part of the term, is forfeited by the lessee's taking in a partner, and letting him use parts of the premises exclusively and the remainder jointly with himself. *Roe* v. *Sales*, 1 Maule & S. 297. But a covenant not to underlet any part of the premises without license is not broken by taking in lodgers. *Doe* v. *Laming*, 4 Camp. 77. A forfeiture for breach of a covenant not to underlet is waived by accepting rent with knowledge of the underletting. *Walrond* v. *Hawkins*, 32 L. T. (N. S.) 119; 44 L. J. C. P. 116; 23 W. R. 390; L. R., 10 C. P. 342; 12 Eng. 406.

A covenant not to sell or assign is broken only by such a sale or assignment of the term as divests the termor of his whole legal inter-

est or estate therein. A devise of the term is not an assignment (*Fox* v. *Swan*, Styles, 482; *Field* v. *Mills*, 33 N. J. L. 254); nor is an underletting of the premises (*Crusoe* v. *Bugby*, 2 W. Bl. 766; 3 Wils. 234); but a covenant not to assign or otherwise part with the premises, or any part thereof, for the whole or any part of the term is broken by an underlease. *Doe* v. *Worsley*, 1 Camp. 20.

A lease for lives, containing a covenant by the lessee "not to sell, dispose of, or assign his estate in the demised premises without the permission of the lessor," and a clause of forfeiture for non-performance of covenants, is not forfeited by a lease of part of the premises by the lessee for twenty years Nor would a sale of the whole premises on execution against the lessee work a forfeiture of the estate, unless there was fraud or collusion on his part. *Jackson* v. *Silvernail*, 15 Johns. 278. A covenant not to "assign over or otherwise part with the indenture or the premises thereby leased, or any part thereof," is not broken by underletting for two years. *Jackson* v. *Harrison*, 17 Johns. 66. A covenant not to "alien, sell, assign, transfer and set over, or otherwise part with the lease" of a public house is not broken by depositing it as security (*Doe* v. *Bevan*, 3 M. & S. 353); even where the creditor takes possession of the premises and continues therein until ejectment brought. *Doe* v. *Hogg*, 4 Dow. & Ry. 226. Nor is such a covenant broken by a sale on execution against the lessee, even though he confessed the judgment, unless he did so fraudulently. *Jackson* v. *Corliss*, 7 Johns. 531.

An assignment under a commission in bankruptcy does not work a forfeiture, unless by express agreement (*Roe* v. *Galliers*, 2 Term R. 133); but a voluntary assignment for the benefit of creditors is a breach of a covenant against assignment. *Holland* v. *Cole*, 1 H. & C. 67; 8 Jur. (N. S.) 1066; 31 L. J. Exch. 481; 10 W. R. 563; 6 L. T. (N. S.) 503. Where the term itself depends on the personal occupation of the lessee, his ceasing to inhabit, or a sale in bankruptcy against him, will work a forfeiture *Doe* v. *Clarke*, 8 East, 185.

A sale or assignment in bankruptcy will also give a right of action, where the lessee has covenanted that the term shall cease, if by bankruptcy, execution, or other act of the law, the premises shall become liable to be seized by the sheriff (*Doe* v. *Carew*, 2 Ad. & Ell. [N. S.] 317; 42 Eng. C. L. 692); or where he has covenanted that the lessor shall have a right of re-entry if the lessee, his executors, administrators or assigns shall become bankrupt or insolvent, or suffer any extent, process, etc., the estate shall determine and the landlord have power to re-enter, etc., and the executor of the lessee becomes bankrupt. *Doe* v. *David*, 1 C. M. & R. 405; 6 C. & P. 614.

An assignment which is void is not a breach of the covenant against assignment. *Doe* v. *Powell*, 8 D. & R. 35; 5 Barn. & C. 308; *Doe* v. *Payne*, 1 Stark. 86; *Church* v. *Brown*, 15 Ves. 265. A clause whereby it is "stipulated and conditioned" that the lessee shall not assign, transfer or underlet any part of the land or premises otherwise than to his wife or children, creates a condition, for the breach of which ejectment will lie. *Doe* v. *Watt*, 8 Barn. & C. 308.

A breach of a covenant not to demise, let, assign, make over or part with the possession of lands without the consent of the landlord, by leaving a part, forfeits the whole. *Eyton* v. *Jones*, 21 L. T. (N. S.) 789.

A covenant that the lessee, if he wishes to sell or dispose of his interest, shall give the pre-emption to his lessor and pay him one-tenth of the purchase-money, and if he does not do so the lease shall be forfeited, has been held valid, and the lease held forfeited on the lessee's assigning without offering the pre-emption or paying the tenth of the purchase-money to the lessor (*Jackson* v. *Groat*, 7 Cow. 285; *Jackson* v. *Schutz*, 18 Johns. 174); but a more recent decision holds that such a covenant in a lease in fee is void, as being repugnant to the estate granted. *De Peyster* v. *Michael*, 6 N. Y. (2 Seld.) 467. A mere agreement to sell the lessee's interest and to indemnify against the lessor's claim for one-tenth is not a legal assignment of the lease, and does not work such a forfeiture, although the purchaser has paid the greater portion of the purchase-money and taken possession. *Livingston* v. *Stickles*, 8 Paige, 398; 7 Hill, 253.

Other covenants and conditions in restraint of alienation or of waste have been held lawful, and forfeitures incurred by their breach, enforceable by ejectment. *Verplanck* v. *Wright*, 23 Wend. 506.

It is doubtful whether an attainder of the tenant on conviction for felony is a forfeiture of the lease under a proviso against insolvency. It attaches, if at all, upon the conviction, and may be removed by a subsequent receipt of rent. *Doe* v. *Pritchard*, 5 Barn. & Ad. 765; 27 Eng. C. L. 323.

A covenant to "insure and keep insured" in a given sum of money "during the term," is interpreted to mean insurance against fire; and an omission to keep the insurance good by paying the annual premium works a forfeiture under a clause of re-entry, although there has been no loss by fire. *Doe* v. *Shewin*, 3 Camp. 134; *Doe* v. *Peck*, 1 Barn. & Ad. 428; 20 Eng. C. L. 417. Such a forfeiture will be waived by the receipt of rent after knowledge of the breach. *Price* v. *Worwood*, 4 H. & N. 512; 5 Jur. (N. S.) 472; 28 L. J. Exch. 329.

A covenant to repair and yield up the premises in repair runs with the land and binds the assignee of the lessee. *Minshull* v. *Oakes*, 2

H. & N. 793; 4 Jur. (N. S.) 170; 27 L. J. Exch. 194; *Martyn* v. *Clue*, 18 Q. B. 661; 22 L. J. Q. B. 147. A covenant to substantially repair, uphold and maintain a house binds the lessee to keep up the inside painting. *Monk* v. *Noyes*, 1 Carr. & P. 265; 12 Eng. C. L. 159. Such a covenant is broken by pulling down the premises wholly or partially, even so far as to open doors in a wall, without the previous consent of the lessor. *Gauge* v. *Lockwood*, 2 F. & F. 115; *Doe* v. *Jackson*, 2 Stark. 293. A covenant to keep and leave the house in repair is not satisfied by leaving part of it in an untenantable condition (*Stanley* v. *Towgood*, 3 Scott, 313; 3 Bing. N. C. 4; 32 Eng. C. L 13); and a covenant in a lease of a first-class hotel to keep the same in repair is broken by permitting flues to remain in such a condition that the rooms cannot be used with a fire. *Myers* v. *Burns*, 35 N. Y. (8 Tiff.) 269. The breaking down of a brick wall dividing court yards is a breach of a covenant to "repair and maintain the brick wall." *Doe* v. *Bird*, 6 Carr. & P. 195. A covenant to "keep in repair the premises and also such buildings, improvements and additions as shall be made thereon by the lessee" is not broken by changing the windows and doorways. *Doe* v. *Jones*, 4 Barn. & Ad. 126; 1 N & M. 6.

Where a lease contains a general covenant to keep in repair, and also an independent covenant to repair within three months after notice, and the landlord gave notice to repair "forthwith," he was allowed to maintain ejectment within the three months, the forfeiture being complete before the expiration of that time (*Roe* v *Paine*, 2 Camp. 520); and so where he gave notice to repair "according to the covenants of the lease" (*Few* v. *Perkins*, L. R., 2 Exch. 92; 36 L. J. Exch. 54; 15 W. R. 713; 16 L. T. [N. S.] 62); but where he gave notice to repair "within three months" he could not sue until the expiration of that time. *Doe* v. *Meux*, 4 Barn. & C. 606. Such general and special covenants in the same lease are independent, and a right of entry attaches on breach of the general covenant, without notice under the special one. *Baylis* v. *LeGros*, 4 C. B. (N. S.) 537; 4 Jur. (N. S.) 513.

A covenant in a lease to repair at all times when necessary, and at farthest within three months after notice, is entire, the former part being qualified by the latter. *Horsefall* v. *Testar*, 1 Moore, 89; 7 Taunt. 385. Where a lease gives the lessor the option to make repairs if the lessee does not after notice, the former cannot recover the premises as on a forfeiture after he has elected to repair. *Doe* v. *Lewis*, 5 Ad. & Ell. 277.

A covenant to allow the lessor to come into the house to see the state of repairs at "convenient times" is not broken by excluding him

from some rooms when he comes without previous notice. *Doe* v. *Bird*, 6 Carr. & P. 195.

A covenant "not to permit any trade or business whatsoever" to be exercised on the premises is broken by assigning the lease to a schoolmaster, who keeps his school there (*Doe* v. *Keeling*, 1 M. & S. 95); and one that the lessee "shall not exercise the trade of a butcher thereon" is broken by his selling raw meat at retail, although he does not slaughter there (*Doe* v. *Spry*, 1 Barn. & Ald. 617); and one not to use the premises for the sale of pork is broken by exposing carcasses of swine there, and making contracts for their sale, though they are taken elsewhere to be cut up. *Doe* v. *Elsam*, 1 M. & M. 189. But a proviso for re-entry if the lessee permits any person to inhabit the premises who shall carry on certain specified trades (that of a licensed victualler not being one), or any other business that may be, or grow or lead to be offensive, or any annoyance or disturbance to any of the lessor's tenants, is not broken by the opening of a public house. *Jones* v. *Thorne*, 1 Barn. & C. 715.

A covenant to deliver up at the end of the term all trees standing in an orchard at the time of the demise, reasonable use and wear only excepted, is not broken by removing trees which are decayed and past bearing from a part which is too crowded (*Doe* v. *Crouch*, 2 Camp. 449); but a covenant not to remove or grub up trees is broken by removing them from one part of the premises to another, or by taking them away and planting others, even though a greater number. *Doe* v. *Bird*, 6 Carr. & P. 195.

A lease, containing a proviso for re-entry if the lessee shall commit any waste in or upon the demised premises, is not forfeited by cutting down trees, if they were excepted out of the demise (*Goodright* v. *Vivian*, 8 East, 190); nor is one containing a proviso for re-entry if the lessee commits waste to the value of £10 forfeited by tearing down buildings of greater value, if they are replaced by others, and no injury to the reversion is produced. *Doe* v. *Bond*, 5 Barn. & C. 855. Voluntary waste by the tenant is a determination of the tenancy (*Phillips* v. *Covert*, 7 Johns. 1); and cutting down timber in such a manner as to injure the inheritance is such waste as will enable the lessor to maintain ejectment under clause of re-entry in the lease. *Jackson* v. *Brownson*, 7 Johns. 227; *Schermerhorn* v. *Buell*, 4 Denio, 422; *Kidd* v. *Dennison*, 6 Barb. 9; *Livingston* v. *Reynolds*, 26 Wend. 115; Co. Litt. 53, 54. It is also waste to change the nature and character of the buildings, or to make permanent changes in other property, even though they may enhance the value. *Jackson* v. *Andrews*, 18 Johns. 433; *London* v. *Greyme*, Cro. Jac. 182; *Cole* v. *Green*, 1 Levinz, 309.

The principle that a forfeiture, incurred by a lessee by the breach of a covenant, may be waived by the acts of the lessor, as well as by his words, applies equally to the case of covenants such as we have just been considering as to that of a covenant to pay rent. Where circumstances occur which entitle the lessor to take advantage of a forfeiture, and he does acts which show that he waives that forfeiture, though such as he had no right to do, he cannot afterward take advantage of such forfeiture. *Ward* v. *Day*, 5 B. & S. 359; 33 L. J. Q. B. 254; 12 W. R. 829; 10 L. T. (N. S.) 578.

A forfeiture for the breach by a lessee of a covenant to build within a certain period is waived by acceptance of rent accruing after that period has elapsed. *McGlynn* v. *Moore*, 25 Cal. 384; *Fox* v. *Swann*, Styles, 482; *Goodright* v. *Davids*, Cowp. 803. So, also, in the case of a breach of covenant not to underlet, if the rent is received with knowledge of the breach (*Ireland* v. *Nichols*, 46 N. Y. [1 Sick.] 413); or of a forfeiture by cutting timber. *Gomber* v. *Huckett*, 6 Wis. 323. A forfeiture by non-payment of taxes is waived by the subsequent acceptance of rent in advance and afterward assigning the lease. *Watson* v. *Fletcher*, 49 Ill. 498. A forfeiture by reason of insolvency is waived by accepting rent accrued after the lessee has been discharged in bankruptcy. *Doe* v. *Rees*, 4 Bing. N. C. 384. But the receipt of rent is not a waiver of a forfeiture by the breach of a covenant to plant fruit trees and keep the number good, unless such rent accrued subsequent to the act which works the forfeiture (*Bleecker* v. *Smith*, 13 Wend. 530); nor of one incurred by the breach of a continuing covenant, such as one to work a mine, or one not to use premises in a particular manner, if the breach continues afterward. *Doe* v. *Peck*, 1 Barn. & Ad. 428; *Doe* v. *Gladwin*, 6 Q. B. 953; 51 Eng. C. L. 952; *Jackson* v. *Allen*, 3 Cow. 220.

A right of re-entry for the breach of a covenant in a lease is waived by the lessor's bringing an action for rent subsequently accruing. *Dendy* v. *Nicholl*, 4 C. B. (N. S.) 376; 27 L. J. C. P. 220.

A notice to quit has been held to waive a forfeiture for non-repair, until after its expiration (*Doe* v. *Miller*, 2 Carr. & P. 348); but the authority of the case has been doubted. Giving notice to repair within three months is a waiver of a forfeiture by not repairing immediately under a general covenant to repair. *Doe* v. *Meux*, 4 Barn. & Cres. 606.

A forfeiture for not building on the demised premises within the period fixed by the covenant will not be waived by the lessee's being permitted by the lessor's steward to employ workmen to complete the building after the forfeiture. *Doe* v. *Brindley* 12 Moore, 37; 22 Eng. C. L. 625.

A waiver of one forfeiture incurred by the breach of a covenant not to underlet is not a waiver of a second forfeiture for the same cause. *Doe* v. *Bancks*, 4 Barn. & Ald. 401.

If the landlord, having knowledge of a forfeiture, permits the tenant to expend money in improvements, he thereby waives the forfeiture (*Doe* v. *Allen*, 3 Taunt. 78); but merely lying by without action, while witnessing an act of forfeiture, does not have that effect, especially where there is a continuing cause of forfeiture. *Doe* v. *Watt*, 1 Man. & Ry. 694; 8 B. & C. 308; *Perry* v. *Davis*, 3 C. B. (N. S.); 91 Eng. C. L. 769.

As a general rule, no act will be a waiver unless the landlord had full notice of the forfeiture at the time.

The right of entry may also be suspended without being waived. *Doe* v. *Brindley*, 4 Barn. & Ad. 84. Thus, receiving rent after the expiration of a notice that the lessor will eject for non-payment of taxes, suspends the right of action until a new notice has been given. *Manice* v. *Millen*, 26 Barb. 41.

Upon surrender of a term, either by express words or by writing, by acts inconsistent with the continuance of the lease, or by the act or operation of law, the landlord is of course entitled to the possession, and may maintain ejectment for its recovery.

In this connection, it only remains to inquire who may take advantage of a forfeiture by breach of a covenant or condition. At common law, none but the lessor and his heirs had that right; but this rule was so changed by statute, in the time of Henry VIII, as to give the assignee of the reversion the same right as had the lessor. 1 Washb. Real Prop. 417, 418; *Jackson* v. *Topping*, 1 Wend. 388. By statute in New York, the grantees of the demised lands, the grantees of the rents, and the grantees of the reversion are entitled to the same remedies as their grantors or lessors would have been if no change in title had taken place.

Aside from such statutes, it may be stated as a general rule, that the particular person entitled to take advantage of such a forfeiture is he who is next in remainder or reversion after the forfeited estate.

Upon breach of a condition annexed to a lease for years, the estate ceases without entry, and the lessor, or any one succeeding to the estate, may have ejectment to recover possession, except where the lease expressly provides that the lessor shall enter. *Parmelee* v. *Oswego, etc., R. R. Co.*, 6 N. Y. (2 Seld.) 74.

When the condition is that the lessees will not do a particular act without leave, if leave is once granted to the lessees, or to any one of

them in the manner provided by the lease, the condition is dispensed with forever (*Dumper* v. *Syms*, Cro. Eliz. 815; 4 Coke, 119); and if the condition is entire, a license to dispense with a part is a dispensation of the whole.

Provisos for re-entry are construed strictly as including only the persons expressly named. If the power is given to a person named, his executor cannot enter for condition broken; and if the lessee covenants only that *he* will not assign, etc., his executors and administrators are not bound. *Hussell* v. *Gowthwaite*, Willes, 500; *Doe* v. *Smith*, 1 Mass. 359. The mere omission to name the heirs and assigns of the lessor in a proviso for re-entry will not, however, defeat their right if the statute gives it to them.

If one who has only an equitable estate in lands under a settlement, demises them for a term of years, reserving rent, and a right of re-entry for non-payment or non-performance, to himself, his heirs and assigns, the reservation to heirs and assigns may be rejected, and the reversioner may maintain ejectment for a breach of the covenants. *Greenaway* v. *Hart*, 2 C. L. R. 370; 14 C. B. 340; 18 Jur. 449; 23 L. J. C. P. 115.

One of several coparceners, to whom a lease and the possession descends, cannot alone maintain ejectment for breach of a covenant on a power of re-entry. *Doe* v. *Lewis*, 5 Ad. & Ell. 277. A corporation may enforce a forfeiture of a lease granted by the directors of a joint-stock company to which it succeeded, where the act of incorporation makes all the contracts of such directors valid and effectual as if they had been incorporated at the time. *Doe* v. *Kendall*, 2 Moody & R. 66.

A power of re-entry cannot be reserved to a stranger. Co. Litt. 214. A proviso in a building lease, executed by a trustee and his *cestui que trust*, reserving a power of re-entry to both, was held void, the state of the title appearing in the lease. *Doe* v. *Lawrence*, 4 Taunt. 23. A power of re-entry reserved in a lease executed by a mortgagee and the executrix of the mortgagor, "to them or either of them," has been held to inure to the mortgagee only (*Doe* v. *Adams*, 2 Tyr. 289); and a proviso in an underlease made by the lessor, that the lessor and lessee may re-enter for a breach of covenant, was held good only in favor of the lessee. *Doe* v. *Wheeler*, 4 Bing. 276. A tenant for years can maintain ejectment against his sub-lessee for breach of the covenants of his sub-lease (*Doe* v. *White*, 4 Bing. 276); even though he demises his whole term and has no reversion. *Doe* v. *Bateman*, 2 Barn. & Ad. 158.

§ 3. **By and between mortgagor and mortgagee.** A mortgage is

the conveyance of an estate, either directly or in some other manner, by way of pledge or security for the payment of money or the performance of some prescribed act. As the right to maintain ejectment usually depends upon the legal title, the question arises here, which of the parties has that title? The ancient doctrine was, that the legal estate vested immediately in the mortgagee, subject to be defeated upon performance of the condition. The mortgagor, remaining in possession with the consent of the mortgagee, was deemed a tenant at will, and was liable to be put out of possession by the landlord at his pleasure. Upon this doctrine is founded the common-law right of the mortgagee to maintain an action for the possession of the mortgaged premises, against the mortgagor or third parties. If the relationship existing between the parties was in any sense a tenancy, it was a peculiar one, and not strictly a tenancy at will, but rather one at sufferance, and no notice to quit was necessary to terminate it.

The modern and now generally prevailing doctrine is, that the mortgage is a mere security, and that the legal title remains in the mortgagor, at least until default. *Fletcher* v. *Holmes*, 32 Ind. 497; *Williams* v. *Beard*, 1 S. C. 309; *Carpenter* v. *Bowen*, 42 Miss. 28. By some authorities it is held that, after default, the legal title passes to the mortgagee (*Johnson* v. *Houston*, 47 Mo. 227); though even then the mortgage remains a mere security, and is extinguished, and the title reverts when the debt is paid (*Pease* v. *Pilot Knob Iron Co.*, 49 Mo. 124); but others hold that the mortgagor remains the real owner and is entitled to possession after breach as well as before. *Mann's Exrs.* v. *Falcon*, 25 Tex. 271. For most purposes it is conceded by all that, as against all parties but the mortgagee, the mortgagor is the owner and has the whole estate. *Howard* v. *Robinson*, 5 Cush. 123; *Fay* v. *Brewer*, 3 Pick. 204. He may, therefore, maintain ejectment against a mere intruder, although himself in default (*Olmsted* v. *Elder*, 5 N. Y. [1 Seld.] 144); and even where he conveys absolutely, taking back a defeasance, pending such a suit, that will not defeat the suit. *Gibson* v. *Seymour*, 3 Vt. 565.

The effect of the statutes enacted in New York and several other States, prohibiting mortgagees from bringing actions of ejectment against their mortgagors, is to confirm the title in the latter until foreclosure. It is even held in Michigan that under such a statute the possession of a mortgagee who goes in without the consent of the mortgagor, though peaceably taken, cannot be upheld (*Newton* v. *McKay*, 30 Mich. 380); and that the mortgagor can recover the possession from the mortgagee at any time before his rights have been in some way foreclosed. *Humphrey* v. *Hurd*, 29 Mich. 44. These cases, however,

seem to be exceptional, the rights of a mortgagee in possession being almost universally recognized

In the following cases, as well as in numerous others, it has been decided that a mortgagor cannot maintain ejectment against the mortgagee in possession after condition broken *Gillett* v *Eaton*, 6 Wis. 30; *Tallman* v. *Ely*, id. 244, *Conner* v. *Whitmore*, 52 Me. 185. At least, he cannot do so until the mortgage is paid (*Botton* v. *Brewster*, 32 Barb. 389; *Sahler* v. *Signer*, 44 id. 606; *Stoddard* v. *Rotton*, 5 Bosw. 378; *Randall* v. *Raab*, 2 Abb. 307; *Holt* v. *Rees*, 44 Ill. 30); and, even though the mortgagee has received sufficient rents and profits to satisfy the mortgage, the action cannot be sustained until an accounting has been had and such rents and profits applied. *Hubbell* v. *Moulson*, 53 N. Y. (8 Sick.) 225. In Massachusetts it is held that the mortgagor cannot maintain the action, although he has tendered the whole amount due after default, but must seek his remedy in equity. *Hill* v. *Payson*, 3 Mass. 559; *Parsons* v. *Welles*, 17 id. 419.

Nor can the mortgagor maintain such action against a tenant of the mortgagee (*Hennesy* v. *Farrell*, 20 Wis. 42); or any one deriving title under the mortgage. *Stark* v. *Brown*, 12 Wis. 572; *Pace* v. *Chadderdon*, 4 Minn. 499. Nor can a purchaser, at a suit on a judgment against the mortgagor, recover the possession from the mortgagee (*Doe* v. *Tunnell*, 1 Houst. 320); or a purchaser of the mortgagor's interest recover it from an equitable mortgagee in possession. *Chase* v. *Peck*, 21 N. Y. (7 Smith) 581.

In New Hampshire, neither a mortgagor nor his assignee of the equity of redemption can maintain a real action against the mortgagee or his assignee. *Johnson* v. *Elliot*, 26 N. H. 67.

At common law, the mortgagee could, immediately after forfeiture by non-payment, maintain ejectment against either the mortgagor or any other party in possession, without notice; and this rule very generally prevails at the present day, except where changed by statute. *Thunder* v. *Belcher*, 3 East, 449, *Birch* v. *Wright*, 1 Term R. 378; *Rockwell* v. *Bradley*, 2 Conn. 1; *Wakeman* v. *Banks*, id. 445; *Blaney* v. *Bearce*, 2 Greenl. 132; *Erskine* v. *Townsend*, 2 Mass. 493; *Colman* v. *Packard*, 16 id. 39; *Wilson* v. *Hooper*, 13 Vt. 653; *Stedman* v. *Gassett*, 18 id. 346; *Fuller* v. *Wadsworth*, 2 Ired. 263; *Jackson* v. *Warren*, 32 Ill. 331; *Fitchburg, etc.* v. *Melven*, 15 Mass. 270. This is especially so where the mortgage gives a power of re-entry and sale on default (*Doe* v. *Giles*, 5 Bing. 421; 2 M. & P. 749; *Ahern* v. *White*, 39 Md. 409); even though such mortgage provides that the mortgagor shall be a tenant at a certain rent. *Doe* v. *Tom*, 4 Q. B. 615; *Doe* v. *Olley*, 12 Ad. & Ell. 481; *Doe* v. *Day*, 2 Ad. & Ell. (N. S.) 147. And where

the mortgage provides for the payment of interest annually, or payment in installments, and for a forfeiture in case of non-payment, the mortgagee can maintain the action whenever an installment of interest or principal is over due and unpaid. *Alsop* v. *Peck*, 2 Root, 224; *Carroll* v. *Ballance*, 26 Ill. 9.

In Connecticut, it is held that a second mortgagee can maintain ejectment against the mortgagor although the first mortgage is outstanding (*Savage* v. *Dooley*, 28 Conn. 411); and in England, that a second mortgagee who takes an assignment of a term to attend the inheritance, without notice of a prior mortgage, and has all the title deeds, may maintain such action even against the first mortgagee. *Goodtitle* v. *Morgan*, 1 Term R. 755.

The action can be maintained not only against the mortgagor, but against his assignee or any person claiming under him. *Lyman* v. *Mower*, 6 Vt. 345; *Pierce* v. *Brown*, 24 id. 165; *Walcop* v. *McKinney*, 10 Mo. 229. Thus, it will lie against a tenant to whom the mortgagor gave a lease after the execution of the mortgage, without the privity of the mortgage (*Keech* v. *Hall*, 1 Dougl. 21; *Rogers* v. *Humphreys*, 4 Ad. & Ell. 299; 5 N. & M. 511; 1 H. & W. 625; *Bank* v. *Bates*, 11 Conn. 519); but not against a tenant whose lease was prior to the mortgage. *Doe* v. *Wharton*, 3 Term R. 2; *Thunder* v. *Belcher*, 2 East, 449. It will also lie against a subsequent purchaser of the equity of redemption, who remains in possession, though he may have conveyed away his interest (*Johnson* v. *Phillips*, 13 Gray, 198); or against one who has purchased the mortgaged premises at sheriff's sale on execution under a judgment rendered upon the note secured by the mortgage, since he acquires merely the equity of redemption. *Vansant* v. *Allmon*, 23 Ill. 30.

It has been held in Vermont that the mortgagee can maintain the action even after the statute of limitations has run on the mortgage debt. *Reed* v. *Shepley*, 6 Vt. 602. In New Jersey it has been held that a first mortgagee does not become divested of his right of action by filing a bill to foreclose, in connection with a second mortgagee, procuring a sale of the premises and accepting a sheriff's deed, whether the sale is valid or not. *Den* v. *Stockton*, 7 Halst. 322.

The assignee of a mortgagee has the same right of action as his assignor, and so have his heirs, or in case of their non-residence, his executor or administrator. *Smartle* v. *Williams*, 1 Salk. 245; *Brown* v. *Mace*, 7 Blackf. 2.

A mortgagee in possession by agreement with the mortgagor can maintain ejectment against a third party, on that right existing at the

commencement of the action. *Chapman* v. *Del., Lack., etc., R. R. Co.*, 3 Lans. 261.

But, as before noticed, there are statutes in several of the American States expressly prohibiting the prosecution of actions of ejectment by mortgagees against their mortgagors. In those States, therefore, a mere mortgagee, or one having only his interest, cannot maintain such action. *Sahler* v. *Signer*, 37 Barb. 329; *Stewart* v. *Hutchins*, 6 Hill, 143; *Hemans* v. *Lucy*, 1 N. Y. Sup. (T. & C.) 523. The prohibition extends equally to one who occupies the position of an equitable mortgagee. *Carr* v. *Carr*, 52 N. Y. (7 Sick.) 251; *Murray* v. *Walker*, 31 N. Y. (4 Tiff.) 399; *Dodge* v. *Wellman*, 43 How. 427; 1 Abb. Ct. App. 512.

It has been held in Massachusetts that a second mortgagee cannot maintain ejectment against the tenant of a prior mortgagee in possession for condition broken. *Batcheller* v. *Pratt*, 10 Cush. 185.

There are some special limitations to which the right of action of a mortgagee is subject, among which are these, that one who has foreclosed without getting jurisdiction of the mortgagor, and has bid in the property, cannot maintain the action against a person in possession who is a stranger to the mortgage, if entitled to do so, without proving a debt due and unpaid which was secured by the mortgage (*Fladland* v. *Delaplaine*, 19 Wis. 459); and a mortgagee of a copyhold, not admitted by the lord, cannot sustain the action against the tenant of the mortgagor unless the tenancy is otherwise established. *Rayson* v. *Adcock*, 12 C. B. (N. S.) 867.

Ordinarily the mortgagor is not entitled to demand of possession or notice to quit before action brought, unless the words of the conveyance creating the mortgage operate as a redemise of the premises to him until default. *Doe* v. *Goldwin*, 2 Q. B. 143; *Doe* v. *Day*, id. 147. Where the mortgagee elects to consider the mortgagor in possession after condition broken as his tenant, he is a tenant at sufferance merely, and is not entitled to notice to quit; nor is a purchaser from him in any better condition. *Jackson* v. *Warren*, 32 Ill. 331. But a lessee of the mortgagor prior to the mortgage is entitled to such notice before action. *Cadle* v. *Moody*, 7 Jur. (N. S.) 1249; 30 L. J. Exch. 385.

A demand and receipt by the mortgagee from the tenant of the mortgagor of the interest due on his mortgage, in lieu of payment of rent, will debar him from maintaining ejectment on a demise anterior to such payment; but the receipt of such interest from the mortgagor will not have that effect. *Doe* v. *Hales*, 7 Bing. 322; *Doe* v. *Cadwallader*, 2 Barn & Ad. 473; *Evans* v. *Elliott*, 9 Ad. & Ell. 342. A demand and receipt of interest on a mortgage and incidental costs is, however, a

waiver of default in the payment of interest. *Langridge* v. *Payne*, 2 Johns. & H. 423; 10 W. R. 726

§ 4. **Forfeitures.** In the two preceding sections we have sufficiently noticed the cases in which a landlord may maintain ejectment for the breach of a covenant by his tenant, or a mortgagee for non-payment of money due by his mortgagor, and it only remains to speak of forfeitures incurred by the breach of covenants or conditions in contracts for the purchase of lands, deeds, devises, and grants, and the parties by and against whom they may be enforced.

And first, it may be remarked that a covenant, with a proviso allowing the covenantee to re-enter in case of a breach thereof, is substantially a condition, and will be treated as such in this section. Such a covenant is, however, to be construed according to the actual intent of the parties as collected from the whole instrument, and not with the strictness applicable to conditions at common law.

Certain covenants run with the land, and inure to the benefit of and bind the successors in title of the parties to them. These are such, and only such, as concern the land itself in whosesoever hands it may be, and become united with and form a part of the consideration for which it, or some interest in it, is parted with between them. 2 Washb. Real Prop. 263. Thus, a covenant for title enhances the price, a rent reserved out of a grant diminishes the price, and the benefit or the burden falls upon whoever takes the estate; and a forfeiture arising upon such a covenant may, as a general rule, be taken advantage of by the covenantee, or his successor in title, as against the covenantor or any one deriving title from him.

A condition does not defeat the estate to which it is annexed, except at the election of him who has a right to enforce it; and at common law he must exercise his election by making an entry on the premises, and nothing short of that would have the effect to defeat the estate. Upon the breach of a condition in law, that is, one that is implied from the nature of the estate, either the lessor, his heirs, or his alienee of the estate, may avail himself of the right to enter. Co. Litt. 214. But, ordinarily, the breach of a condition in a deed can be taken advantage of only by the person who created the estate, or his heirs, to defeat such estate. At common law, that right cannot be aliened or assigned, and it will not pass by a grant of the reversion, nor can a stranger take advantage of it. Co. Litt. 214 a; *Gray* v. *Blanchard*, 8 Pick. 284; *Fonda* v. *Sage*, 46 Barb. 122. This rule has, however, been modified by statute in England, and in some of the American States. An act of 32 Henry VIII gives to grantees or assignees of the reversion the same rights with respect to forfeitures

as heirs previously had; and they have that right in Connecticut. In Pennsylvania the assignee of the grantor, or a purchaser at sheriff's sale on execution against him, can avail himself of such a forfeiture. *McKissick* v. *Pickle*, 16 Penn. St. 140. In New Jersey it has been held that neither grantees of the reversion nor remaindermen can exercise that right, but only the grantor and his heirs, or, in case of a corporation grantor, its successors. A more recent statute gives the right to the devisees of the grantor. *Southard* v. *Central R. R. Co.*, 2 Dutch. (N.J.) 21. Under a statute of Massachusetts, it is held that where a conditional estate is created by will, the devisee, or the residuary devisee, or his heir under the same will, has the same right to enter and defeat the estate for condition broken as an heir at common law. *Hayden* v. *Stoughton*, 5 Pick. 528; *Brigham* v. *Shattuck*, 10 id. 306; *Austin* v. *Cambridgeport Parish*, 21 id. 215.

Where land is devised in fee to one heir upon condition that his sisters shall have the use and occupation of a room in the dwelling-house, and their support out of the estate as long as they remain unmarried, if the condition is broken by the devisee, his sisters can maintain ejectment for the shares of the estate to which they would have been entitled as heirs had there been no will. *Hogeboom* v. *Hall*, 24 Wend. 146.

The grantee of a deed given as security may take advantage by ejectment of a breach of the condition of the defeasance, that the grantor shall, within a year, put a cellar under the house and finish it. *Harrington* v. *Donaldson*, 31 Vt. 535. The grantor of a deed on condition that no intoxicating liquor shall be manufactured or sold on the premises conveyed, by the grantee, his heirs, or assigns, the conveyance to be void in case of breach, can maintain ejectment without previous entry or demand of possession, on breach of such condition. *Plumb* v. *Tubbs*, 41 N. Y. (2 Hand) 442. But a grantor of real estate in trust for charitable uses cannot enter and re-possess the premises or maintain ejectment against those claiming under the trustees, on breach of the conditions of the trust. *Barr* v. *Weld*, 24 Penn. St. 84.

Where lands are conveyed subject to certain conditions, the grantor reserving a right of re-entry for a failure by the grantee, his heirs or assigns to comply with those conditions, the original grantor or his heirs can maintain ejectment to regain possession on such breach; but ordinarily, as before stated, no one else can do so. *Nicoll* v. *N. Y. & Erie R. R. Co.*, 12 N. Y. (2 Kern.) 121; *Jackson* v. *Topping*, 1 Wend. 388 In such a case all of the original grantors or their heirs must join as plaintiffs, and one cannot sue alone for his share. *Cook* v. *Wardens, etc., of St. Paul's Church*, 5 Hun, 293.

Under a lease of land containing a condition for re-entry if the lessee, his executors, administrators or assigns, or any tenant, under-tenant, or occupier of premises, or any part thereof, should during the term be convicted of any offense against the game laws, the assignee of the reversion cannot maintain ejectment on breach. *Stevens* v. *Copp*, 38 L. J. Exch. 31; L. R., 4 Exch. 20.

Where lands are granted in fee, upon condition of the payment of a yearly rent, reserving a right of re-entry on breach of that condition, the grantor, or his heir, assignee or devisee, except where restrained by statute, can maintain ejectment for the land in case of default in payment of such rent. *Doe* v. *Horsley*, 3 N. & M. 567; *Van Rensselaer* v. *Slingerland*, 26 N.Y. (12 Smith) 580; *Van Rensselaer* v. *Barringer*, 39 N.Y. (12 Tiff.) 9; *Moore* v. *Wingate*, 53 Mo. 398; *Galbraith* v. *Fenton*, 2 Serg. & R. 359. If there is more than one heir, each can sue for his share. *Cruger* v. *McClaury*, 41 N. Y. (2 Hand) 219. The grantee of a second rent charge whose rent is in arrear can maintain ejectment against the owner of the first rent charge, who has entered and made repairs, his rent being in arrears, if he has received rents sufficient to pay arrears and repairs. *Harper* v. *Cooke*, 2 Jur. (N. S.) 527; 25 L. J. Ch. 467.

But a grantor cannot sue on breach of a condition subsequent, after he has assigned his estate under the insolvent law. *Stearns* v. *Harris*, 8 Allen, 597. Nor can the executor of the grantor take advantage of the breach of such a condition. *Van Rensselaer* v. *Hayes*, 5 Denio, 477.

A violation of covenants in a grant, such as one that the grantee will not erect any structure whereby the view or prospect of a third party will be obstructed, with proviso that, in case of breach, the premises shall be forfeited to the grantor, will entitle the latter to repossess himself of the lands conveyed by action of ejectment. *Gibert* v. *Peteler*, 38 N. Y. (11 Tiff.) 165; 6 Trans. App. 329. A grantor who, by deed, assigns a term of five hundred years, with covenant by the grantee to expend £2,000 in building on the premises within seven years, and re-entry clause, can maintain ejectment on breach of that covenant. *Colville* v. *Hall*, 14 Ir. C. L. 265.

By statute in New York, grantees of demised lands, or of a reversion thereof, and assignees, or heirs and personal representatives of the grantor, or of his grantee or assignee, may have the same remedy as the lessor would have had. *Willard* v. *Tillman*, 2 Hill, 274. And where the covenant is divisible in its nature and the premises are occupied by several in parcels, the action may be against each for the parcel occupied by him (*Van Rensselaer* v. *Jewett*, 5 Denio, 121); especially

where the covenant relates particularly to the part occupied by the defendant. *Astor* v. *Miller*, 2 Paige, 68.

The owner of the reversion of land can maintain ejectment against the owner of a life estate who has forfeited it by the commission of waste. *Patrick* v. *Sherwood*, 4 Blatchf. C. C. 112.

Where lands sold by the State have been forfeited by default of the first vendee in making payments and resold, the second vendee can maintain ejectment to obtain possession without first giving notice to quit. *Candee* v. *Haywood*, 34 Barb. 349.

A vendor, who has permitted the purchaser of land under an executory contract of sale to take possession, may elect to treat the contract as rescinded if the purchaser fails to comply with the terms of the contract, and some cases hold that he may do so without giving notice to quit or demanding possession, or tendering a deed (*Dean* v. *Comstock*, 32 Ill. 173; *Baker* v. *Gittings*, 16 Ohio, 485; *Gregg* v. *Von Phul*, 1 Wall. 274; *Hotaling* v. *Hotaling*, 47 Barb. 163, *Wright* v. *Moore*, 21 Wend. 230); but others hold that the vendor must give notice of rescission (*Jackson* v. *Moncrief*, 5 Wend. 26); or notice to quit. *Fears* v. *Merrill*, 9 Ark. 559; *Costigan* v. *Wood*, 5 Cranch, 507.

If the vendor cannot give a good title to the whole of the land, he cannot maintain ejectment against the vendee in possession, without refunding expenditures made by him on the premises in expectation of getting a good title. *Gibert* v. *Peteler*, 38 Y. Y. (11 Tiff.) 165; 6 Trans. App. 329.

It was formerly held in Iowa that the vendor could maintain such action without returning the money paid or the notes given for purchase-money (*Allyn* v. *Johnson*, 13 Iowa, 604; *Abbott* v. *Chase*, id. 453; *Farley* v. *Goocher*, 11 id. 570); but now, by statute, the vendee can set up such payment in his answer as a ground for specific performance of the contract.

If a vendee refuses to receive a deed when tendered, on the agreed day, and does not pay or offer to pay the purchase-money, or makes default as to other covenants or conditions, he forfeits his license to occupy the premises. *Pierce* v. *Tuttle*, 53 Barb. 155.

A purchaser of mortgaged premises at a foreclosure sale can maintain ejectment against a vendee of the mortgagor in possession under an executory contract of purchase upon his default in paying the money due on the contract. *Dwight* v *Phillips*, 48 Barb. 116. But one who takes from the vendee an assignment of his contract as security cannot recover against his assignor on default. *Campbell* v. *Swan*, 48 Barb. 109.

It has been held that it is not necessary that a party seeking to take

advantage of the breach of a condition should have himself received any injury therefrom. In one case, the grantor was allowed to recover where he had ceased to have any interest in the premises before the breach (*Gray* v. *Blanchard*, 8 Pick. 284); but the weight of authority seems to be that, where his estate ceases before breach, he cannot acquire any right to enter therefor. *Underhill* v. *Saratoga, etc., R. R. Co.*, 20 Barb. 455; *Rice* v. *Boston R. R. Co.*, 12 Allen, 142; *Hooper* v. *Cummings*, 45 Me. 359.

The right to enforce a forfeiture for condition or covenant broken fails, of course, where the law excuses the performance of it, or it has been waived by the party entitled to enforce it. A condition subsequent is excused when its performance either becomes impossible by the act of God, or by the act of the party for whose benefit it was created, or is prohibited or prevented by the act of the law; in which case it is discharged altogether and the estate is made absolute.

The absence of one to whom a payment is to be made, and his neglect to demand it, though it does not make performance impossible, excuses it until demand. *Bradstreet* v. *Clark*, 21 Pick. 389. The minority or coverture of the one who is to do an act does not render its performance either impossible or unlawful, and has no effect to excuse its nonperformance. *Cross* v. *Carson*, 8 Blackf. 138· *Garrett* v. *Scouten*, 3 Denio, 334.

A waiver may be predicated upon the acts of a party, as well as upon his express agreement, as we have already seen in respect to the covenants of a lease. But for that purpose there must be some act on his part recognizing the continued existence of the estate. A mere silent acquiescence in, or parol assent to an act which is a breach of an express condition in a deed does not amount to a waiver of the forfeiture thereby incurred (*Jackson* v. *Crysler*, 1 Johns. Cas. 126); unless the party entitled to take advantage of it, with knowledge of the breach, permits the other to incur expenses about the property without objection. *Ludlow* v. *N. Y. & Har. R. R. Co.*, 12 Barb. 440.

If a condition which may be taken advantage of to destroy the estate is once dispensed with, in whole or in part, it is gone forever.

§ 5. **Dower or curtesy.** Dower is a life estate given by law to a widow, in a portion of her husband's lands and tenements, after his death, for the sustenance of herself and the nurture and education of her children. By the common law, which still prevails generally in this country either by adoption or by re-enactment, this consists of one-third of the lands of which the husband was seized in fee at any time during the coverture. In some of the States, however, a widow is dowable only in the lands of which the husband died seized. In others

she is also entitled to dower in leasehold and equitable estates; and generally, she is dowable in the equity of redemption of premises mortgaged by her husband. *Denton* v. *Nanny*, 8 Barb. 618; *Dubs* v. *D* 31 Penn. St. 149; *Moore* v. *Rollins*, 45 Me. 493; *Steuart* v. *Beard*, 4 Md. Ch. 319; *Henagan* v. *Hartlee*, 10 Rich. Eq. 285; *Blair* v. *Thompson*, 11 Gratt. 441. The contrary is held in Tennessee and Alabama. *McIver* v. *Cherry*, 8 Humph. 713; *Cheek* v. *Waldrum*, 25 Ala. 152.

Dower does not attach where there is but a momentary seizin in the husband, as where he is the mere medium through whom the title passes instantaneously (*Stow* v. *Tifft*, 15 Johns. 459); or where he gives a mortgage for the purchase-money of land simultaneously with the conveyance to himself. In the latter case it does not attach as against the mortgagee or his assigns, but it does as against all others. *Mayburry* v. *Brien*, 15 Peters, 21.

A widow is entitled to dower in land which her husband has leased to another for years, although the term has not expired (Co. Litt. 46); also in land covenanted to be conveyed to her husband (*Thompson* v. *Thompson*, 1 Jones [N. C.], 430; *Reed* v. *Whitney*, 7 Gray, 533); and in a quarry or bed of ore which has been opened and worked by her husband. *Billings* v. *Taylor*, 10 Pick. 460; *Stoughton* v. *Leigh*, 1 Taunt 402; *Coates* v. *Cheever*, 1 Cow. 460.

A judicial sale of land in an action against the husband does not divest the wife of her dower right, even though it was on foreclosure of a mechanic's lien. *Bishop* v. *Boyle*, 9 Ind. 169.

She is not entitled to dower in property taken for public use, for which compensation has been made (*Moore* v. *City of New York*, 4 Sandf. 456; 8 N. Y. 110); nor in partnership property, except in the surplus after payment of the partnership debts (*Galbraith* v. *Gedge*, 16 B. Monr. 634; *Goodburn* v. *Stevens*, 1 Md. Ch. 420); nor in property of which the husband was a joint tenant (*Mayburry* v. *Brien*, 15 Peters, 21); or of which he was a mere trustee. *Powell* v. *Monson, etc., Manf. Co.*, 3 Mason, 347; *Bartlett* v. *Gouge*, 5 B. Monr. 152; *Coster* v. *Clarke*, 3 Edw. Ch. 428. Nor can a widow maintain ejectment for dower in lands sold on foreclosure of a mortgage existing at the time her husband purchased the land, and which he assumed to pay, although she was not made a party to the action. *Smith* v. *Gardner*, 42 Barb. 356.

But we cannot further enlarge upon the subject of dower. It is sufficient here to say that, to entitle a widow to dower, except where the statutes otherwise provide, the husband must have been, in fact or in law, beneficially seized of a legal estate of inheritance during cover-

ture. Of this right the husband cannot deprive her by will; but it may be barred by her own act in joining with him in a conveyance, or subsequently releasing to the grantee or owner of the premises; or in accepting a jointure settled on her before marriage, or a provision in her husband's will in lieu of dower; or by some act of the law, such as granting a divorce or the like, which by statute is a ground of forfeiture.

There are several ways in which a widow entitled to dower may have it assigned to her. Probate courts are usually clothed with power to assign dower in lands of which the husband died seized; and courts of chancery have in many cases concurrent jurisdiction with courts of law over actions for the recovery of dower. *Swaine* v. *Perrine*, 5 Johns. Ch. 482. But where the legal title to dower is in controversy, as it ordinarily is where the lands out of which it is claimed were alienated by the husband, or sold under some legal proceeding against him, during his life-time, the remedy is at law. *Wells* v. *Beall*, 2 Gill & Johns. 468.

At common law ejectment does not lie for dower before assignment (*Doe* v. *Nutt*, 2 Carr. & P. 430); but this restriction of the right of action is removed by statute in several of the American States; and in others the widow is allowed to bring the action at any time after six months, or some other limited period, from the time when her right accrued. In New Hampshire no action accrues to the widow until one month after she has demanded that dower be assigned to her. *Robie* v. *Flanders*, 33 N. H. 524.

An action of ejectment for dower is governed by substantially the same rules as other actions for the recovery of real property. Where lands are assigned for dower, less than the highest degree of certainty in description will be sufficient to enable the widow to maintain ejectment, if the land intended can be determined therefrom. Thus, it has been held that an assignment of "two stalls in the south-west corner of a horse barn, with a space of twelve feet square above for hay, also the three west rows of apple trees on the west side of an orchard running north and south in the center between the third and fourth rows," gave all the land west of the center line between the third and fourth rows, and was sufficiently certain. *Patch* v. *Keeler*, 27 Vt. 252.

If a widow brings ejectment for land which has been admeasured for dower, she may recover the specific land so admeasured to her, even though she only declares for an undivided one-third. *Borst* v. *Griffin*, 9 Wend. 307; *Oothout* v. *Ledings*, 15 id. 410. The fact that the land sought to be recovered has been admeasured to the plaintiff as dower will not prevent the validity of her claim for dower, the title or seizin

of her husband, or her marriage, from being controverted in the action. *Parks* v. *Hardey*, 4 Bradf. 15.

The action must be brought against the actual occupant of the land of which the plaintiff is dowable. It will lie against a tenant who has an estate or interest therein less than a freehold. *Ellicott* v. *Mosier*, 7 N. Y. (3 Seld.) 281. In New York, dower must be demanded before suit, otherwise the plaintiff cannot recover costs.

The statutes of limitation apply to actions for dower, as well as to other actions. *Berrien* v. *Conover*, 1 Harr. (N. J.) 107; *Robie* v. *Flanders*, 33 N. H. 524. The time for commencing such action is usually limited by statute to twenty years after the death of the husband or the removal of the disability of the widow. In Georgia, proceedings for the recovery of dower must be instituted within seven years from the time the right thereto accrued, and not afterward.

Curtesy is a life estate given by law to a husband in the lands of his deceased wife under certain circumstances. To entitle him to such estate at common law, the wife must not only have had a title to the land, but she must have been actually seized during coverture of an estate in fee simple or fee tail, and he must have had by such wife a child born alive who could have inherited the estate. 4 Kent's Com. 28; *Marsellis* v. *Thalhimer*, 2 Paige, 35; *Orr* v. *Hollidays*, 9 B. Mon. 59; *Petty* v. *Malier*, 15 id. 591. In some of the American States, however, the birth of a living child is not essential, and in others actual seizin of the wife is held unnecessary. *Bush* v. *Bradley*, 4 Day, 298; *Kline* v. *Beebe*, 6 Conn. 494; *Jackson* v. *Sellick*, 8 Johns. 262; *Furguson* v. *Tweedy*, 56 Barb. 168; *Green* v. *Liter*, 8 Cranch, 249; *Davis* v. *Mason*, 1 Peters, 503; *Day* v. *Cochran*, 24 Miss. 261; *Merritt* v. *Horne*, 5 Ohio St. 307.

A mere naked seizin of the wife as trustee is not sufficient to entitle the husband to curtesy (*Chew* v. *Commissioners, etc.*, 5 Rawle, 160); nor, if he is seized as trustee of property devised to his wife, can he claim curtesy after divorce. *Schoch's Appeal*, 33 Penn. St. 351.

It has been held that, where real estate is limited to the separate use of a wife, so that the husband has no legal or equitable interest in the estate, he cannot be tenant by curtesy. *Moore* v. *Webster*, L. R., 3 Eq. 267; 35 L. J. Ch. 429; 15 L. T. (N. S.) 460. In Illinois he cannot have such estate in lands conveyed to the wife for her sole and separate use, with power of disposal, after she has disposed of them by will. *Pool* v. *Blakie*, 53 Ill. 495. The same effect has in some cases been given to the provisions of statutes giving married women the sole control of their separate property; but recent decisions in New York hold that the statutes of that State on the subject, which have prob-

ably extended the rights of married women as far as any others, do not have the effect to deprive the husband of curtesy in lands of the wife not disposed of by her during life. *Matter of Winne*, 1 Lans. 508; S. C., 2 id. 21; *Zimmerman* v. *Schoenfeldt*, 3 Hun, 692; 6 N. Y. Sup. (T. & C.) 142; *Hatfield* v. *Sneden*, 54 N. Y. (9 Sick.) 280.

A tenant by curtesy, like any other life tenant, may sue in ejectment for the recovery of lands in which he has such estate. He need not wait until the death of his wife, but is entitled to the possession immediately upon becoming tenant by curtesy initiate, and can then sue alone for his wife's land and for its detention. *Wilson* v. *Arentz*, 70 N. C. 670. After the birth of a child, he may even demise such an interest in her land as will sustain the action. *Chambers* v. *Handley*, 3 J. J. Marsh. 98. So, also, if title be cast by descent on a married woman, her husband may recover the land by ejectment, and after the termination of his life estate the person holding the interest in remainder can bring an action for its recovery. *Gregg* v. *Tesson*, 1 Black (U. S.), 150. The rule is different in Pennsylvania. *Bratton* v. *Mitchell*, 7 Watts, 113.

ARTICLE VI

WHO CANNOT MAINTAIN THE ACTION.

Section 1. In general. This subject having been partially treated under article 4 of this title, less space will be devoted to it here than would otherwise be necessary. The object of the action of ejectment being the recovery of the possession of lands wrongfully withheld from the plaintiff, it necessarily follows that a party already in possession of the lands in dispute cannot maintain the action therefor. *Kribbs* v. *Downing*, 25 Penn. St. 399. It is true, as has been before remarked, that several States have provided by statute for the trial and determination of claims to real property, set up by persons who have not entered upon it nor ousted the owner, by an action similar in some respects to the action of ejectment, but it is not in any proper sense that action.

As ability to maintain ejectment depends upon the title and right of possession of the claimant, so inability to maintain it arises from the lack of any title, or of sufficient title or right, or of the particular title or right on which he bases his action.

An assignee of a mortgage cannot maintain ejectment for the mortgaged premises if he bases the action upon a claim to ownership in fee. *Speer* v. *Hadduck*, 31 Ill. 439.

A mere tender of payment, by one whose land has been sold on exe-

cution, to the purchaser who has obtained a sheriff's deed, of the purchase-money and interest required for its redemption, does not revest him with the title, so as to enable him to sue such purchaser in ejectment. *Paris* v. *Burger*, 4 Humph. 325.

The refusal of a tenant holding over on an unexpired lease to pay rent to the grantee of the premises will not enable such grantee to maintain ejectment therefor, unless the refusal was with notice of the sale. *O'Connor* v. *Kelly*, 41 Cal. 432.

By statute in several of the States heirs cannot recover lands of their ancestor from the widow, until after dower is assigned.

Heirs of a patentee of land who have not redeemed from a forfeiture for non-payment of taxes cannot maintain ejectment therefor against anybody whatever. *Usher* v. *Pride*, 15 Gratt. 190.

An administrator *de bonis non* has no title to the land of the decedent, and cannot maintain ejectment therefor (*Appleton* v. *Strickland*, 32 Me. 174); nor can an ordinary administrator, as such, against a tenant in possession of lands of his intestate. *Morrill* v. *Menifee*, 5 Ark. 629. Nor can an executor maintain such action against the wife and son of the testator, to whom the rents and profits of land are devised, until after the expiration of the time for which they are devised, although he has power after that to sell or dispose of the premises. *Thompson* v. *Schenck*, 16 Ind. 194.

The executor of a grantor of land in fee, subject to a rent charge, cannot sue for possession on default in payment of rent. *Van Rensselaer* v. *Hayes*, 5 Denio, 477. Nor can one to whom the executor of a tenant for years has conveyed the demised premises after ouster, maintain ejectment therefor. *Mosher* v. *Yost*, 33 Barb. 277.

At common law, the grantee of a reversion could not enter or bring ejectment for a breach of the covenants of a lease, and the English statute on that subject giving him that right applies only to leases under seal. *Sheets* v. *Selden's Lessee*, 2 Wall. 177.

Neither the guardian nor the committee of a lunatic can maintain ejectment in his own name (*Brooks* v. *Brooks*, 3 Ired. 389; *Petrie* v. *Shoemaker*, 24 Wend. 85); nor can the guardian by nature or for nurture of an infant. *Ratcliff's Case*, 3 Coke, 37.

One who purchases, on execution against a father, land which was paid for by him, but the title taken in the name of the son, gets no title which will enable him to recover the property from the son. *You* v. *Flinn*, 34 Ala. 409.

A tenant at sufferance has no title, and cannot maintain ejectment although turned out of possession without demand. *Harrison* v. *Murrell*, 8 Carr. & P. 134.

A vendor who sells land, giving a bond for title, and then transfers without recourse the note given for the purchase-money, has no remaining interest in the land which will sustain ejectment. *Tompkins* v. *Williams*, 19 Ga. 572

The owner of land which is subject to an easement cannot maintain ejectment against the person entitled to the easement for using it according to his right. *Wilklow* v. *Lane*, 37 Barb. 244; *Kurkel* v. *Haley*, 47 How. 75.

In Massachusetts one joint tenant cannot have a writ of entry to foreclose a mortgage, notwithstanding the provision of the statute allowing joint tenants, etc., to join or sever in suits for the recovery of lands. *Webster* v. *Vandeventer*, 6 Gray, 428.

As a general rule, one having a mere equitable title cannot maintain the action. This rule applies to an equitable mortgagee who holds the legal title as security for a debt, as well as to other mortgagees, in States where the action is prohibited to mortgagees (*Carr* v. *Carr*, 4 Lans. 314; 52 N. Y. [7 Sick.] 251; *Murray* v. *Walker*, 31 N.Y. [4 Tiff.] 399); *cestuis que trust*, except where a surrender of the legal estate may fairly be presumed (*Gillett* v. *Treganza*, 13 Wis. 472; *Eaton* v. *Smith*, 19 id. 537; *Brown* v. *Combs*, 5 Dutch. [N. J.] 36); to one who has granted lands in trust to secure debts, and to his grantee by deed subsequent to the trust deed (*Heard* v. *Baird*, 40 Miss. 793); to one who has granted lands for charitable uses, as against persons claiming under the trustees, notwithstanding they may have broken their trust (*Barr* v. *Weld*, 24 Penn. St. 84); to one who has purchased the interest of one partner in lands of an association (*Clagett* v. *Kilbourne*, 1 Black [U. S.], 346); to one who purchased land from a mortgagor subsequent to the mortgage although not made a party to an action of foreclosure (*Frische* v. *Kramer*, 16 Ohio, 125); to a purchaser at a sale on a decree of foreclosure, in an action to which the owner of the equity of redemption was not made a party (*Nat. Fire Ins. Co.* v. *McKay*, 5 Abb. [N. S.] 445); and to one who receives from the purchaser under an executory contract of sale an assignment thereof as security, as against his assignor on default. *Campbell* v. *Swan*, 48 Barb. 109.

An ordinary receiver cannot maintain ejectment for the lands of the debtor (*Wynn* v. *Newborough*, 3 Bro. C. C. 88); nor can one appointed in supplementary proceedings, to whom no conveyance has been executed. *Moak* v. *Coats*, 33 Barb. 498.

A mere tenant at will, such as the obligee of a bond for the conveyance of title, who takes possession under an agreement that he may occupy until the purchase-money is due, cannot maintain the action

against the obligor or his grantee. *Richardson* v. *Thornton*, 7 Jones' Law, 458; *Trammell* v. *Simmons*, 17 Ala. 411.

The purchaser on execution of the title of the plaintiff in a pending ejectment suit does not thereby become his legal representative, so as to be entitled under the laws of Mississippi to be substituted and continue the action after the death of such plaintiff. *Hamilton* v. *Homer*, 46 Miss. 378

ARTICLE VII.

WHO MAY BE SUED.

Section 1. In general. It is unnecessary to repeat here what has already been said in art. 5, respecting actions against mortgagors and mortgagees, tenants and other persons who have forfeited their right to the possession of lands. We will, therefore, proceed to give the rules which prevail in other cases, and illustrate them by a few decisions.

The general, if not the universal rule is, that, 1st, if there is any one in the actual occupation of the premises sought to be recovered, he must be made defendant (*Taylor* v. *Crane*, 15 How. Pr. 358; *Schuyler* v. *Marsh*, 37 Barb. 350; *People* v. *Ambrecht*, 11 Abb. 97; *Albertson* v. *Reding*, 2 Murph. 283; *Banyer* v. *Empie*, 5 Hill, 48; *Lockwood* v. *Drake*, 1 Mich. 14, *Klink* v. *Cohen*, 13 Cal. 623); 2d, if the premises are not occupied, the action may be brought against any one exercising acts of ownership over them adversely to the plaintiff (*Hill* v. *Kricke*, 11 Wis. 442; *Chilson* v. *Buttolph*, 12 Vt. 231); or 3d, against any one who claims title adversely to the plaintiff. *Carter* v. *Hunt*, 40 Barb. 89; *Abeel* v. *Van Gelder*, 36 N. Y. (9 Tiff.) 513; *Mordecai* v. *Oliver*, 3 Hawks, 479.

If the premises are actually occupied by the tenant of a corporation, the action must be against the tenant, and not against the corporation (*People* v. *Mayor, etc., of N. Y.*, 28 Barb. 240); but if occupied by a mere servant or employee of the person claiming title, the person beneficially interested, that is, the employer, must be sued. *Doe* v. *Staunton*, 1 Chit. 119; 2 Barn. & Ad. 371; *Gulliver* v. *Swift*, 2 Ld. Ken. 511; *Chiniquy* v. *Cath. Bishop of Chicago*, 41 Ill. 148; *Hawkins* v. *Reichert*, 28 Cal. 535. There is, however, this exception to the rule, that, when the employer is not amenable to process, the employee is the proper defendant. An instance of this kind is the case of an officer of the army occupying ground for camp, under the orders of the president of the United States, or of the secretary of war. *Polack* v. *Mansfield*, 44 Cal. 36; *Jackson* v. *Wilcox*, 1 Scam. 344. The New York supreme

court has in one case held that a soldier of the United States in charge of real property, who acts in obedience to the commands of his superior officers, is not, in the sense of the statute, the actual occupant. *People* v. *Ambrecht*, 11 Abb. 97. It has also held that a railroad company, which has its track in a street, but does not occupy the whole street, is not an actual occupant, and cannot be sued as such. *Redfield* v. *Utica, etc., R. R. Co.*, 25 Barb. 54.

If the premises are occupied by a tenant, and not by the party from whom he received his lease, or by his servants, the action should be against the tenant (*Champlain & St. Law. R. R. Co.* v *Valentine*, 19 Barb. 484); and yet, in a recent case, it has been held by the New York court of appeals, that the landlord claiming adversely to the plaintiff is a necessary party to a complete determination of the controversy, and the presence of the tenant is not necessary to enable him to litigate the title. *Finnegan* v. *Carraher*, 47 N. Y. (2 Sick.) 493.

In Maine a writ of entry for mortgaged premises will lie against the tenant in possession, though he be not the holder of the equity of redemption. *Tuttle* v. *Lane*, 17 Me. 437.

If the defendant has abandoned the possession before the action is commenced, it cannot be sustained. *Allen* v. *Dunlap*, 42 Barb. 585.

Where the premises are not actually occupied, but work is done upon them by a servant of the person making claim to them, the servant is the person exercising acts of ownership, and is the proper defendant in an action of ejectment. *Shaver* v. *McGraw*, 12 Wend. 558. It has been held in Virginia that the action will lie against persons who have made entries and surveys of any part of the premises, and set up claim thereto, though not in the actual occupation at the time suit is brought. *Harvey* v. *Tyler*, 2 Wall. 328.

In order to sustain the action against a person who merely sets up a claim to land, he must make a serious and intentional claim of ownership. *Banyer* v. *Empie*, 5 Hill, 48; *Abeel* v. *Van Gelder*, 36 N. Y. (9 Tiff.) 513; 2 Trans. App. 99. Mere idle declarations that he is the owner are not sufficient. Ib. Some cases hold that the claim set up must be of nothing less than a freehold, unless there is an actual ouster, but in the latter case the action will lie on a claim of less than a freehold. *Wyman* v. *Brown*, 50 Me. 139; *Dow* v. *Plummer*, 17 id. 14.

In Pennsylvania the action will not lie against administrators to enforce specific performance of a contract of their decedent, but must be against the holder of the legal title. *Thompson* v. *Adams*, 55 Penn. St. 479.

The old doctrine that ejectment will not lie against a corporation

aggregate was exploded long since. *Dater* v. *Troy Turnpike, etc., Co.*, 2 Hill, 629. A church edifice will be deemed in the actual occupation of the religious society using it, and an ejectment therefor should be brought against such corporation and not against its trustees. *Lucas* v. *Johnson*, 8 Barb. 244.

Ejectment will lie in favor of a reversioner, or a purchaser of his interest on execution, against the heirs of the life tenant holding over after his death. *Nims* v. *Sabine*, 44 How. Pr. 252.

Where a husband is in possession of his wife's land and there is no trustee, an action of ejectment will lie against him in favor of a purchaser of his interest on a judgment enforcing a mechanic's lien. *Martin* v. *Pepall*, 6 R. I. 92.

An infant may be sued in ejectment as well as an adult (*Marshall* v. *Wing*, 50 Me. 62; *McCoon* v. *Smith*, 3 Hill, 147), but not on a possession by his guardian. *Spitts* v. *Wells*, 18 Mo. 468.

If a tax sale was illegal for any cause, ejectment will lie in favor of the former owner against the holder of the tax deed (*Knox* v. *Cleveland*, 13 Wis. 245; *Whitney* v. *Marshall*, 17 id. 174); at least, after tender of the proper sum for redemption. *Rand* v. *Robinson*, 11 Cush. 289.

It will also lie against a tenant at will, who refuses to surrender the premises on demand. *Wheelwright* v. *Freeman*, 12 Metc. 154; *Dolby* v. *Miller*, 2 Gray, 135. As we have before seen, it will also lie against tenants in common, coparceners and joint tenants who actually oust their co-tenants or deny their rights.

A receiver in possession cannot be sued in ejectment, unless an order of court is first obtained. *Angel* v. *Smith*, 9 Ves. 335.

A plaintiff in ejectment may sometimes elect as to who shall be made defendants. Thus, when a party really claims to own unoccupied premises, and has contracted to sell them to others who are exercising acts of ownership over them, the plaintiff may elect to make such purchasers defendants (*Edwards* v. *Farmers' F. Ins. Co.*, 21 Wend. 467); and when, in an action against several defendants, it appears that they occupy, in severalty, distinct portions of the premises, he may elect against which he will proceed. *Fosgate* v. *Herkimer Manuf., etc., Co.*, 9 Barb. 287; *Dillaye* v. *Wilson*, 43 id. 261; *Keene* v. *Barnes*, 29 Mo. 377.

In an action of ejectment, the party claiming and defending the title of the tenant in possession, is properly a party defendant. *Abeel* v. *Van Gelder*, 36 N. Y (9 Tiff.) 513; 2 Trans. App. 99; *Finnegan* v. *Carraher*, 47 N. Y. (2 Sick.) 493. In North Carolina it has been held that the landlord of the person in possession (*Harkey* v. *Houston*

65 N. C. 137); and in Vermont, that any one under whom such person may, legally speaking, be said to hold, may be joined with him as defendant, whatever may be the nature or character of the tenancy. *Marvin* v. *Dennison*, 20 Vt. 662.

In Louisiana, if a petitory action is brought against a lessee in possession, he must make known his lessor, and then the latter must be made defendant and the former be discharged. *Millaudon* v. *Ranney*, 18 La. Ann. 196.

The grantee of an absolute deed who leaves his grantor in possession, or a mortgagee who claims that the premises sought to be recovered are included in his mortgage, may, in Vermont, be joined as defendant with the grantor or mortgagor. *Patch* v. *Keeler*, 28 Vt. 332.

Generally, a married woman ought not to be joined with her husband, when he is in possession (*Rose* v. *Bell*, 38 Barb. 25); yet it is held in Michigan that where the husband and wife occupy as a homestead lands conveyed to the wife, both may be joined as defendants in an action to try the validity of the conveyance. *Hodson* v. *Van Fossen*, 26 Mich. 68.

Several persons claiming to own land in undivided shares may be joined as defendants in an action of ejectment by one claiming paramount title (*Mc Cown* v. *Hannah*, 3 Oreg. 302); and several occupants of a building, though occupying different portions, may be joined in an action therefor (*Pearce* v. *Ferris*, 10 N. Y. [6 Seld] 280); and where several are joined who claim under different titles, they may defend under their respective titles. *White* v. *Pickering*, 12 Serg. & R. 435.

Formerly an action of ejectment would abate upon the death of one or all of the plaintiffs or defendants, but provisions have been made in most, if not all of the American States, for a continuance of the action, or against the successors in title. Under such a provision, it has been held in Illinois that the action survives against surviving defendants, and against the heir of a sole defendant (*Guyer* v. *Wookey*, 18 Ill. 536); but the contrary is held in New York. *Mosely* v. *Mosely*, 11 Abb. 105.

§ 2. **Who let in to defend.** This is a question of grave importance, because, if the landlord or owner of the premises in controversy is not made a party to the suit, or permitted to appear and defend his rights, those rights may be fatally prejudiced by the indifference, negligence or fraud of the tenant in possession. *Prima facie* such tenant is the person to be sued; and it has been held in several cases that, at common law, he was under no obligation to give notice to his landlord, and even if he did, the latter was not permitted to appear and

defend without the tenant's consent. *Goodright* v. *Hart*, Strange, 830; *Anonymous*, 12 Mod. 211. To remedy this defect several acts were passed by parliament at different times, securing to landlords the right to notice and to appear in the action. Similar statutes have been enacted in most of the American States. The term "landlord," in the English statute, was construed to extend to every person claiming title consistent with the possession of the occupier, whether he had previously exercised acts of ownership over the lands in dispute or not, and that interpretation has been followed in this country. The statutes enacted here ordinarily make express provision that the landlord of the person sued, and any other person having privity of estate or interest with either tenant or landlord, may, on his own application, be admitted to defend after suit brought. *Shaver* v. *McGraw*, 12 Wend. 558; *Herbert* v. *Alexander*, 2 Call. 418; *Mitchell* v. *Baratta*, 17 Gratt. 455; *Fitch* v. *Cornell*, 1 Sawyer, 156; *Willingham* v. *Long*, 47 Ga. 540; *State* v. *Orwig*, 34 Iowa, 112; *Stribbling* v. *Prettyman*, 57 Ill. 371.

An infant may defend as landlord, even though the occupant has long exercised acts of ownership, and the plaintiff alleges the infant's title to be frandulent. *Stiles* v. *Jackson*, 1 Wend. 316.

In some of the States, if judgment is recovered in an action against the tenant, without notice to the landlord or reversioner, he may, after the expiration of the term, have the judgment set aside, and be admitted to defend the suit. *Hough* v. *Hammond*, 36 Tex. 657. This has frequently been allowed where judgment has been taken by default against the casual ejector. *Doe* v. *Roe*, 3 Per. & D. 317; *Jackson* v. *Stiles*, 4 Johns. 493; *Waters* v. *Harrison*, 4 Bibb, 87.

To entitle any person to be admitted as defendant he must ordinarily show that a privity of interest existed between him and the defendant when the action was commenced, and that it was then consistent and connected with the possession of the latter, and liable to be divested or disturbed by a claim adverse to that possession. *Den* v. *Fen*, 13 N. J. Law, 66; 11 id. 185; *Jackson* v. *McEvoy*, 1 Caines, 151.

It is not a matter of right that one whose title appears to have been acquired after suit brought should be admitted to defend as landlord. *Roe* v. *Doe*, 36 Ga. 611; *Richardson* v. *Harvey*, 37 id. 224; *Penn. Canal Co.* v. *Cent. Iron Works*, 7 Phil. 662; *Brown* v. *O'Brien*, 3 Penn. Law J. 115.

Coparceners or tenants in common with the occupant will not be admitted unless they show that they are interested in the result of the suit. *Minke* v. *McNamee*, 30 Md. 294; *Jackson* v. *White*, 2 Cow. 585.

The person from or through whom the defendant derived his title may properly be admitted to defend that title. One who purchases

land, the subject of an ejectment, at a sheriff's sale, may be allowed to defend the action, if he relies wholly upon the title of the defendant and does not deny his possession. *McFadden* v. *Wallace*, 38 Cal. 51.

But one who claims in opposition to the title of the defendant cannot be admitted as a co-defendant with him; nor is he entitled to be admitted as a co-defendant with the landlord, though he claims to be a tenant in common with him. *Jackson* v. *Flint*, 2 Cow. 594. A person who claims an independent ownership has no right to be made defendant to a suit involving only the rights of other litigants. *Files* v. *Watt*, 28 Ark. 151. A *cestui que trust* who has never been in possession has no right to be so admitted (*Lovelock* v. *Doncaster*, 4 Term R. 122); nor where the tenant came in under the lessor of the plaintiff, will a third party be permitted to defend as landlord. *Doe* v. *Rhys*, 2 Younge & Jer. 88.

An heir, whose father had obtained a rule allowing him to defend just before his death, will be allowed the same right on a subsequent application. *Doe* v. *Roe*, 3 Term R. 783.

A mortgagee will be allowed to come in and defend an ejectment against his mortgagor, if really interested in the result. *Doe* v. *Cooper*, 8 Term R. 645; *Doe* v. *Roe*, 6 Bing. 613; 4 Moore & Pa. 437; *Den* v. *Fen*, 1 Halst. 478. The same privilege would be given to an assignee of the mortgage in like case.

Where, pending an ejectment by husband and wife for land inherited by the wife, a third party commenced another ejectment against the same defendant for the same land, the husband was allowed to come in and defend the latter action. *Den* v. *Steward*, 2 N. J. 929. But a landlord will not be permitted to defend alone, in place of the tenant, without the consent of the plaintiff. *Beardsley* v. *Torrey*, 4 Wash. C. C. 286.

In Kentucky, to entitle one who has a judgment in ejectment, but has not had execution and delivery of possession, to be admitted as defendant, he must show that his title is consistent with the possession of the occupant. *Troublesome* v. *Estill*, 1 Bibb, 128.

The possession of the mansion house of a deceased person by his widow, before allotment of dower, is consistent with that of the heirs, and they have, therefore, a right to be admitted to defend an ejectment against her. *Porter* v. *Robinson*, 3 A. K. Marsh. 253.

One who has been many years in possession of the premises by himself or his tenant may properly be admitted to defend (*Buford* v. *Gaines*, 6 J. J. Marsh. 34; *Waters* v. *Harrison*, 4 Bibb, 87), or one who disputes the plaintiff's title, claimed to have been derived from her. *Fenwick* v. *Grovenor*, 7 Mod. 71.

ARTICLE VIII.

DEMAND AND NOTICE BEFORE ACTION.

Section 1. In general. The question whether a plaintiff in ejectment must demand possession, or give notice to quit, before bringing his action, is one the answer to which depends very much upon the real nature of the defendant's holding, and the terms of the contract, if any, existing between the parties, but still more upon the provisions of the various statutory enactments on the subject.

Wherever the defendant is a mere trespasser or wrong-doer, or has terminated the rights he once possessed by his own act, and wherever the term for which he holds is by agreement to end at a time certain, without notice, or has terminated by its own limitation, the plaintiff is relieved from any necessity of making demand or giving notice; but generally, if the defendant is in possession by a right existing before the plaintiff's title accrued, which has not terminated, or which is not absolutely determinable at the mere pleasure of the plaintiff, that right must be determined by demand or notice before ejectment can be sustained against him.

§ 2. **When necessary.** Notice to quit is generally necessary when the occupant went into possession with the assent of the owner for no definite term. The case of a purchaser under an executory contract is an exception to this rule. *McClane* v. *White*, 5 Minn. 178. One who is in possession under a tenancy from year to year is entitled to notice to quit before action, unless he has forfeited his rights by his own act. *Doe* v. *Stennett*, 2 Esp. 717; *Doe* v. *Watts*, 7 Term R. 83; *Doe* v. *Browne*, 8 East, 166. If, however, such tenancy is under a judgment debtor or mortgagor, it must be prior in point of time to the judgment or mortgage under which the plaintiff claims, in order to entitle the tenant to notice. *Doe* v. *Wharton*, 8 Term R. 2; *Warne* v. *Hall*, Dougl. 21; *Thunder* v. *Belcher*, 3 East, 449. The assignee of one who took a lease from the mortgagor before the mortgage is also entitled to notice. *Cadle* v. *Moody*, 7 Hurlst. & Norm. 997. Even though the lease was given after the mortgage, the lessee is entitled to notice if the mortgagee has consented to receive him as his tenant.

As has before been remarked, the owner of premises may create a tenancy from year to year, by mere acts from which a recognition of tenancy may be inferred. Acceptance of rent accruing after the expiration of a lease; or mere acquiescence in the continued occupancy of premises by tenants whose right has expired by the determination of their landlord's estate, or after their own term has expired, are such

acts, and they give the right to notice to quit. *Bishop* v. *Howard*, 2 Barn. & Cres. 100; *Roe* v. *Prideaux*, 10 East, 158; *Doe* v. *Somerville*, 6 Barn. & Cres. 126; *Chamberlin* v. *Donahue*, 41 Vt. 306. But it is not necessary to repeat here what has been stated at length in treating of the action as between landlord and tenant.

A tenant at will might formerly be put out of possession at the mere pleasure of the landlord, and without notice; but the tenancies at will existing at the present day are generally, for the purposes of notice to quit, deemed from year to year, and must be terminated in like manner. *Phillips* v. *Covert*, 7 Johns. 4; *Jackson* v. *Salmon*, 4 Wend. 327.

A tenant who continues in possession after his term has expired, and pending a negotiation for a further lease, is entitled to notice (*Doe* v. *Stennett*, 2 Esp. 716); and so is one who has been put into possession under a lease which is void. *Goodtitle* v. *Gallaway*, 4 Term R. 680; *Clayton* v. *Blakey*, 8 id. 3; *Hegan* v. *Johnson*, 2 Taunt. 148.

In some cases it has been held that a mortgagor is entitled to notice to quit before ejectment (*Doe* v. *Giles*, 5 Bing. 421); but that is not the general rule.

Where the owner of premises puts another in possession with a view to a future tenancy or purchase, or under circumstances of a like nature, although he has done no act acknowledging a regular tenancy, he cannot afterward eject him without first demanding possession, unless the latter has by some wrongful act determined his lawful possession. *Right* v. *Lewis*, 13 East, 210; *Doe* v. *Jackson*, 1 Barn. & Cres. 448. Thus, it has been held that a vendor who has put a purchaser in possession under an executory contract of sale cannot avoid the contract and recover possession by ejectment, without notice, express or implied, of his intention so to do (*Dennis* v. *Warder*, 3 B. Monr. 173); nor can the subsequent vendee of such vendor maintain ejectment against the prior vendee without demand of possession (*Stackhouse* v. *Doe*, 5 Blackf. 570); nor where parties have exchanged land, but have not delivered deeds pursuant to the agreement, can one party recover back his land from the other for such failure, without notice and an offer to rescind the contract. *Maynard* v. *Cable*, Wright, 18. It has been held by the United States circuit court, that where the vendee entered paying part of the purchase-money, he cannot be dispossessed for failure to pay the residue without notice to quit, or notice of rescission of the contract, or demand of payment. *Costigan* v. *Wood*, 5 Cranch's C. C. 507. But the weight of authority, founded perhaps upon the statutes under which the decisions were made, is that no notice or demand is necessary in such a case, as will appear in the following section.

Where one tenant in common is in possession of the common prop-

erty, a demand of possession is in general necessary before a co-tenant can maintain ejectment therefor. *Newell* v. *Woodruff*, 30 Conn. 492.

If one who conveyed or leased lands during his minority wishes to recover them back after he has attained his majority he must first give notice of disaffirmance. *Doe* v. *Abernathy*, 7 Blackf. 442; *Clawson* v. *Doe*, 5 id. 300.

A devisee of land which had been previously conveyed by his devisor by a conveyance which was void by the statute of mortmain, cannot maintain ejectment therefor without first demanding possession (*Doe* v. *Walker*, 14 L. J. Q. B. 181); and such a demand is also necessary when a devisee seeks to recover from the heirs of his devisor lands which they have divided after an intervening life estate, supposing that they had a right to them. *Doe* v. *Clifford*, 2 C. & K. 448. A formal demand of possession has also been held necessary before ejectment for non-payment of rent, although the lease provided that on non-payment of a half year's rent the landlord might enter on the premises until it should be fully satisfied. *Doe* v. *Bowditch*, 8 Q. B. 973; 10 Jur. 637; 15 L. J. Q B. 266.

The necessity for a demand of rent before a landlord can maintain ejectment against his tenant for non-payment has already been sufficiently considered.

§ 3. **When not necessary.** As a general rule, a notice to quit is unnecessary unless the defendant entered as a tenant of some kind (*Eaton* v. *George*, 3 Jones' Law, 385; *Shackleford* v. *Smith*, 5 Dana, 232); and a recognition of tenancy by executors managing an estate for heirs in receiving rent does not make it necessary. *Doe* v. *Roberts*, 16 M. & W. 789.

Nor is it necessary where a tenancy exists but is to terminate on a precise day (*Cobb* v. *Stokes*, 8 East, 358; *Messenger* v. *Armstrong*, 1 Term R. 54; *Right* v. *Darby*, id. 162; *Hauxhurst* v. *Lobree*, 38 Cal. 563); nor where the defendant's rights have terminated by lapse of time, as where he has continued in possession under an agreement for a lease until the time for which it was to be granted has expired (*Doe* v. *Stratton*, 4 Bing. 446); nor where he entered under a parol lease void because for more than a year, and held over after the expiration of one year (*Harrison* v. *Marshall*, 4 Bibb, 525; *Treves* v. *Savage*, 4 El. & Bl. 36; 18 Jur. 680; 23 L. J. Q. B. 339); nor where he entered without the privity of the landlord, and afterward negotiated for a lease but failed to secure it *Doe* v. *Quigley*, 2 Camp. 505.

A lessee who has covenanted in the lease to deliver up possession at the expiration of his term without further notice, and that the landload may re-enter and repossess the premises, then or afterward, is

not entitled to notice to quit (*McCanna* v. *Johnston*, 19 Penn. St. 434); nor is one who has covenanted that non-payment of rent for ten days shall give the landlord the right to sue without notice. *Eichart* v. *Bargas*, 12 B. Monr. 464.

The dissolution of a copartnership terminates a lease of a building to be occupied by it, and no notice is necessary before ejectment against one of the copartners. *Doe* v *Miles*, 1 Stark. 181; 4 Camp. 373; *Doe* v. *Bluck*, 8 Carr. & P. 464.

A trespasser is not entitled to notice to quit (*Meeker* v *Place*, 7 Blackf. 169); nor is one to whom a previous occupant has, without authority, transferred possession, entitled to either notice or demand. *Young* v. *Perry*, Phill. (N. C.) 549. A tenant who disclaims the title of his landlord, attorns to another, or claims to hold adversely, may be treated as a trespasser, and sued in ejectment without previous notice. *Doe* v. *Thompson*, 5 Ad. & Ell. 532; 1 N. & P. 215; 2 H. & W. 451; *Doe* v. *Long*, 9 Carr. & P. 773; *Landsell* v. *Gower*, 17 Q. B. 589; 16 Jur. 100; 21 L. J. Q. B. 57; *Doe* v. *Grubb*, 10 B. & C. 816; *Jackson* v. *Wheeler*, 6 Johns. 272; *Bates* v. *Austin*, 2 A. K. Marsh. 270; *Harrison* v. *Middleton*, 11 Gratt. 527; *Wood* v. *Morton*, 11 Ill. 547; *Den* v. *Blair*, 3 Green (N. J.), 181. So, also, where one who entered as a tenant or *quasi* tenant attempts to set up title in a third party. *Meraman* v. *Caldwell*, 8 B. Monr. 32.

A tenant at sufferance is not entitled to notice to quit (*Jackson* v. *Parkhurst*, 5 Johns. 128), unless some statute requires it.

In case of a tenancy at will, a demand is sufficient, without any notice to quit. *Doe* v. *Davies*, 7 Exch. 89; 21 L. J. Exch. 60.

One tenant in common who relies upon an adverse possession of the common property is not entitled to a demand of possession before action by his co-tenant. *Harrison* v. *Taylor*, 33 Mo. 211.

A grantee with covenants of warranty can maintain ejectment against his grantor remaining in possession, without any demand of possession or notice to quit. *Dodge* v. *Walley*, 22 Cal. 225.

A mortgagor is not entitled to notice to quit after default, before action by the mortgagee, where the mortgage contains a power of re-entry and sale (*Doe* v. *Giles*, 5 Bing. 421; 2 M. & P. 749; *Doe* v. *Olley*, 12 Ad. & Ell. 481; 4 P. & D. 275; 4 Jur. 1084; *Doe* v. *Tom*, 4 Q. B. 615; 7 Jur. 847; *Pierce* v. *Brown*, 24 Vt. 165; *Carroll* v. *Ballance*, 26 Ill. 9); nor is a tenant from year to year under the mortgagor by lease which is subsequent to the mortgage (*Den* v. *Stockton*, 7 Halst. 322); nor a purchaser of the mortgagor's interest, or one having possession but no privity of contract or estate with the mortgagor. *Jackson* v.

Chase, 2 Johns. 84; *Jackson* v. *Fuller*, 4 id. 215; *Den* v. *Wade*, 1 Spenc. 291.

A purchaser of land on execution can sue the execution debtor in ejectment without giving notice to quit. *Snowden* v. *McKinney*, 7 B. Monr. 258.

If public lands once sold are bid in by the State upon a resale for default of the first purchaser, he is not entitled to notice to quit from a subsequent purchaser before the latter can maintain ejectment against him. *Candee* v. *Haywood*, 34 Barb 349.

If a vendee in possession of land under an executory contract of sale makes default in payment of the purchase-money, he is not, as a general rule, entitled to either notice to quit, demand of the amount due, demand of possession, or tender of deed, before the vendor can maintain ejectment against him. *Hotaling* v. *Hotaling*, 47 Barb. 163; *Wright* v. *Moore*, 21 Wend. 230; *Gregg* v. *Von Phul*, 1 Wall. 274; *Baker* v. *Gittings*, 16 Ohio, 485, *Brumfield* v. *Brown*, 7 Blackf. 142; *Jackson* v. *Moneriej*, 5 Wend. 26; *McClane* v. *White*, 5 Minn. 178. Some exceptions to this rule have been noticed in the preceding section.

Nor is a notice to quit or a demand of possession necessary where the purchaser in possession repudiates the contract (*Prentice* v. *Wilson*, 14 Ill. 41; *Bedford* v. *Thomas*, 6 B. Monr. 332); or where his contract is with a third party not connected with the plaintiff. *Petty* v. *Doe*, 13 Ala. 568.

A failure by the purchaser to perform the other conditions of his contract also gives the vendor a right to sue for possession without demand. *Pierce* v. *Tuttle*, 53 Barb. 155.

§ 4. **When demand and notice sufficient.** The sufficiency of a notice to quit as a foundation for an action of ejectment depends upon its being given by and to the proper party, and being in proper form and properly served.

The proper party to give a notice to quit is the person who is interested in the premises, or his authorized agent. Generally, to make a notice by an agent sufficient, he must have authority at the time he gives it, and a subsequent assent or ratification will not avail (*Doe* v. *Walters*, 10 B. & C. 626; *Doe* v. *Goldwin*, 2 Q. B. 143); but a notice by one as agent for joint tenants has been held good if his authority is subsequently ratified by all. *Goodtitle* v. *Woodward*, 3 Barn. & Ald. 689; *Doe* v. *Sybourn*, 2 Esp. 877.

Where an agent is specially authorized, among other things, to give notice to quit, one signed in his own name, but purporting to be on behalf of the landlord, is sufficient (*Erne* v. *Armstrong*, 6 Ir. C. L.

279; 20 W. R. 370); but one given by an agent merely to receive rents is not sufficient unless recognized by the landlord, and the latter's bringing an action founded on such notice is not of itself a recognition. *Doe* v. *Robinson*, 3 Bing. N. C. 677; 4 Scott, 396; *Pearse* v. *Boulter*, 2 F. & F. 133.

Where several persons are interested in premises as tenants in common, a notice by one of them for himself and his co-tenants will be good for his own share only, except so far as he acts by authority of his co-tenants, enabling each one who gives it to sue for his own share; but one joint tenant may bind the others by a notice in the name of all. *Doe* v. *Hulme*, 2 M. & R. 483. If four joint tenants jointly demise premises from year to year, such as give notice to quit can recover their several shares by ejectment. *Doe* v. *Chaplin*, 3 Taunt. 120.

Where the conditions of a tenancy require that all parties concur in the notice, one which is given by less than all will be invalid. *Right* v. *Cuthell*, 5 East, 491; 2 Marsh, 83; *Doe* v. *Goldwin*, 2 Q. B. 143. A notice given by a person authorized by one of several joint tenants is sufficient to terminate the tenancy as to all. *Doe* v. *Hughes*, 7 M. & W. 139. A notice given by the agent in the names of A and B and "also of several others," is valid only as notice by A and B. *Doe* v. *Foster*, 3 C. B. 215; 15 L. J. C. P. 263.

Where the title is held by joint trustees, all must join in the notice. *Right* v. *Cuthell*, 5 East, 491; 2 Marsh, 83.

An infant entitled to the reversion of premises leased from year to year must give notice to quit in order to terminate it (*Maddon* v. *White*, 2 Term R. 159); and if an ejectment brought by an infant has been compromised, he cannot after coming of age bring a new ejectment without giving notice to quit, even though he has not accepted rent or confirmed the tenancy. *Doe* v. *Noden*, 2 Esp. 530.

A notice by a mortgagor is sufficient to end a tenancy created before the mortgage, if he has general authority from the mortgagee. *Stackpole* v. *Parkinson*, 8 Ir. C. L. 561.

A notice by a receiver in chancery, having a general authority to let lands from year to year, is good. *Doe* v. *Read*, 12 East, 57. A notice given by a remainderman to a tenant under a void lease, from whom he had received rent, will avail a subsequent purchaser from him. *Doe* v. *Hellings*, 6 Jur. 821. A notice by a steward of a corporation is sufficient without proof of authority under seal. *Doe* v. *Pierce*, 2 Camp. 96.

Where a tenant sublets part of the premises, and then surrenders

the remainder to his landlord, it is irregular for the landlord to give notice to the sub-lessees in his own name, but he may do so in the name of the original lessee. *Pleasant* v. *Benson*, 14 East, 234.

The notice should always be given to the immediate tenant of the party giving it. *Jackson* v. *Baker*, 10 Johns. 270. Where a corporation is the tenant, the notice should be addressed to the corporation and not to the officers, but should be served on the latter. *Doe* v. *Woodman*, 8 East, 228. The personal representatives of a tenant from year to year have the same interest in the land which he had, and are entitled to the same notice to quit. *Doe* v. *Porter*, 3 Term R. 13; *Parker* v. *Constable*, 3 Wils. 25. A notice to one of two tenants in common holding over is sufficient (*Doe* v. *Crick*, 5 Esp. 196); and a notice addressed to several joint tenants is sufficient if served on one. *Doe* v. *Watkins*, 7 East, 551. Where the widow of a tenant remains in possession, and it is not shown that some other person is executor or administrator, notice to her is sufficient. *Rees* v. *Perrot*, 4 Carr. & P. 230.

A notice should be addressed to the tenant, but it will not be invalidated by want of address to, or a mistake in his christian name, if he receives and retains it, or if it is received by his family and is understood by them to be intended for him. *Doe* v. *Wrightman*, 4 Esp. 5; *Doe* v. *Spiller*, 6 id. 70; *Clark* v. *Keliher*, 107 Mass. 406.

Wherever it is practicable, the notice should be served on the tenant personally; yet, where that is impracticable, a service by leaving it at the house of the tenant, with his wife or some member of his family of sufficient discretion, to whom its nature and contents are explained at the time, will answer (*Smith* v. *Clark*, 9 D. P. C. 202; 1 W. P. 44; *Doe* v. *Lucas*, 5 Esp. 153; *Pultney* v. *Shelton*, 5 Ves. 261, *n.*); even though never delivered to him. *Fanham* v. *Nicholson*, L. R., 5 H. L. C. 561; 6 Ir. C. L. 188. Delivery to his partner on the premises is sufficient. *Walker* v. *Sharpe*, 103 Mass. 154. And even a notice placed under his door is well served, if it comes to his hand in proper time. *Alford* v. *Vickery*, Car. & M. 280.

As a general rule, the notice should be in writing, and in many of the American States it is so provided by statute; but at common law a parol notice was sufficient, unless a written one was required by the express agreement of the parties (*Legg* v. *Benion*, Willes, 43); and always where the lease was by parol. *Timmins* v. *Rawlinson*, 1 W. Bl. 533; *Doe* v. *Crick*, 5 Esp. 196.

The notice must be positive and explicit, and so certain in respect to the premises and the time when the tenant must leave, that there will be no danger of mistake on his part. *Doe* v. *Cox*, 4 Esp. 185; *Doe* v.

Church, 3 Camp. 71; *Williams* v. *Smith*, 5 Ad. & Ell. 350; 31 Eng. C. L. 643; *Doe* v. *Wilkinson*, 12 Ad. & Ell. 743; *Roberts* v. *Hayward*, 3 Carr. & P. 432. It should be for the whole of the demised premises, or where parts were taken at different times, it must be with reference to the time of entry on the substantial parts.

Except where otherwise provided by statute, the length of time for which the notice is to be given must in all cases have reference to the terms of the letting. Where that is by the month, one month's notice is sufficient (*Doe* v. *Hazell*, 1 Esp. 94); and where it is from week to week, one week's notice is enough. *Jones* v. *Mills*, 10 C. B. (N. S.) 788; 8 Jur. (N. S.) 387; 31 L. J. C. P. 66; *Doe* v. *Raffan*, 6 Esp. 4.

In New York it is held that a renting by the month, or from month to month, must be renewed monthly in order to continue it, and therefore no notice to quit is necessary to terminate it. *People ex rel. Aldhouse* v. *Goelet*, 14 Abb. (N. S.) 130.

In Georgia a tenancy under a verbal lease which makes the rent payable monthly is not a tenancy from year to year, but is terminable as one at will, by two months' notice. *Western Un. Tel. Co.* v. *Fain*, 52 Ga. 18.

Where a month's notice is required to terminate such a tenancy, it must be given at or before the termination of the current month. *Gunn* v. *Sinclair*, 52 Mo. 327. In Kentucky, if a tenant transfers his term or part of it without the written assent of his landlord, he may be put out on ten days' notice. In Wisconsin a tenant at will or sufferance is entitled to one month's notice. In Massachusetts it has been held that a notice by a lessee for years to the under-tenant of his tenant at will, to quit forthwith, was sufficient. *Clark* v. *Wheelock*, 99 Mass. 14.

To terminate a tenancy from year to year a notice of six months is usually required; and such a tenancy may be so terminated at the expiration of the first year. *Doe* v. *Taylor*, 1 Jur. 960. Reserving rent to be paid quarterly does not dispense with such notice. *Shirley* v. *Newman*, 1 Esp. 266.

As has already been stated, a tenancy at will is now generally treated as one from year to year, for the purposes of a notice to quit; and a tenant at will or his personal representative is entitled to a full half year's notice. *Parker* v. *Constable*, 3 Wils. 25.

The time when the notice shall expire must be the day when the tenancy would end unless continued, as, at the end of the month or year. *Nowlan* v. *Trevor*, 2 Sweeny, 67. But that rule does not apply to the case of a vendor seeking to dispossess a defaulting vendee who is in possession under an executory contract of sale. *Landers* v. *Beau-*

champ, 8 B. Monr. 493. Twenty-five days' notice to such a vendee has been held sufficient (*Butner* v. *Chaffin*, Phill. [N. C.] L. 497); but one day's notice is sufficient. *Guess* v. *McCauley*, id 514.

A notice served on the 28th of September to quit on the ensuing 25th of March has been held a sufficient half year's notice (*Roe* v. *Doe*, 6 Bing. 574); and one served on the 26th of September to quit at the end of six calendar months is also good (*Howard* v. *Wemsley*, 6 Esp. 53), and so is one to quit at the end of the current year of tenancy, which will be at the end of one-half year from the date thereof. *Doe* v. *Butler*, 2 Esp. 589; *Doe* v. *Timothy*, 2 C. & K. 351.

A three months' notice served December 25th, to quit on the ensuing 25th of March, is also sufficient. *Ogden* v. *Duffy*, 1 Penn. Leg. Gaz. 4.

But we have perhaps dwelt too long on the subject of notice to quit in this connection, since it will again require attention under the title "Landlord and Tenant."

Before closing, however, it may be well to remark that a notice to quit may be waived by some act recognizing the continuance of a tenancy, as by giving a subsequent notice. *Doe* v. *Humphreys*, 2 East, 237. Whether the mere acceptance of rent after the expiration of the term is a waiver depends upon the intent of the lessor, and that is a question for the jury. *Fitzpatrick* v. *Childs*, 2 Brewst. 365.

ARTICLE IX.

WHAT TITLE OR POSSESSION CONSTITUTES A DEFENSE.

Section 1. In general, and what is a defense. As usually defined by law writers, a defense is the plea or answer made by the defendant to the plaintiff's declaration or complaint. In this article we shall use the term as referring rather to the substance of the defendant's opposition to the plaintiff's claim than to the manner or form in which it is presented. As thus used it may be more accurately defined to be any fact or matter which the defendant will be permitted to urge as a reason why the plaintiff should not succeed in his action.

The claim of the plaintiff in the action of ejectment is, that he is entitled to the possession of the premises in controversy by virtue either of his own absolute title or of a right conferred by the real owner or by some provision of law, and that the same are wrongfully withheld from him by the defendant. Any facts, therefore, which the defendant may be permitted to oppose to this claim, by plea or evidence, which go to disprove the plaintiff's right, or the unlawful entry or

unjust withholding by the defendant, constitute a legal defense, and come within our definition. *Stow* v. *Russell*, 36 Ill. 18.

At common law, the plea of the defendant in ejectment was invariably the general issue, that he was not guilty of the supposed trespass or ouster laid to his charge; and he was seldom, if ever, permitted to put in a special plea. In this country, where the common-law practice prevails, or the plea of the general issue is sanctioned by statute, the form of the plea is substantially the same, but it sometimes denies in terms the unlawful withholding. Under this plea the defendant can avail himself not only of his own right or title, but also of any want of sufficient title or possessory right in the plaintiff.

In many of the American States the defendant is by statute permitted to set up by answer any matter which shows that, as between the parties, the plaintiff is not entitled to maintain his action. The plaintiff is absolutely required to establish his own right, or at least a better right in himself than exists in the defendant, but the latter may content himself with mere negative proof in denial of that right, or he may go on to establish a better right in himself.

§ 2. **What not a defense.** From our definition of a defense it logically follows that any matter or thing which does not go to the denial of the plaintiff's right, or the establishment of a better right in the defendant, is not a defense in ejectment. Originally the action was a legal one, and the defendant was not permitted to set up any merely equitable right or title by way of defense. How far this rule has been changed by various statutes will appear in section 5 of this article.

In the further consideration of the question what particular matters can be, it will incidentally appear what cannot be, set up as defenses, and a few general rules and decisions on the subject will suffice here.

As a general rule, the court will not go behind the legal title to admit evidence that the execution of a deed was induced by fraudulent representations. *Escherick* v. *Traver*, 65 Ill. 379. Other general rules are, that inconsistent defenses, such as an absolute title under a deed, an equitable title under a contract for a deed, and a license to occupy, such as would entitle the defendant to a notice to quit, cannot be set up as defenses to the same action (*Blum* v. *Robertson*, 24 Cal. 128); that in an action of ejectment by a purchaser at a judicial sale under a judgment, the defendant cannot set up matters which might have been pleaded against the plaintiff in the action in which such judgment was obtained (*Evans* v. *Robbins*, 29 Iowa, 472); and that a landlord admitted to defend can set up only such defenses as his tenant might. *Foust* v. *Trice*, 8 Jones, 290; *Sinclair* v. *Worthy*, 1 Wins. 114.

An abuse of trust by a trustee in conveying the trust property cannot be set up as a defense to bar the legal title so conveyed. *Bayard* v. *Colefax*, 4 Wash. C. C. 38.

Another action pending in a court of equity, or even one pending in a higher court, will not avail in ejectment. *Quinn* v. *Quinn*, 27 Wis. 168; *Bissell* v. *Williamson*, 7 Hurlst. & Norm. 391.

An assignment by a widow of her right of dower before it has been set off to her conveys no title which can be set up by a purchaser at an invalid administrator's sale as a defense to an ejectment by heirs. *Howe* v. *McGivern*, 25 Wis. 525. It is held in Missouri that such an assignment conveys a possessory title, which is a good defense in ejectment (*Jones* v. *Manly*, 58 Mo. 559); but probably it would be so only against third parties, as it has since been held there that, where land erroneously delivered to a widow under the Missouri administration law, is sold and conveyed by her, her grantee cannot set up her unassigned dower interest in it as a defense to a suit by the heirs. *Pidcock* v *Buffam*, 61 Mo. 370.

An assignment of his tenancy by a tenant at will or sufferance conveys no title which will avail as a defense to ejectment. *Reckhow* v. *Schanck*, 43 N. Y. (4 Hand) 448.

It is no defense to an action for the recovery of land, that the plaintiff has parted with a right of way over it (*W. Covington* v. *Freking*, 8 Bush [Ky.], 121); or that the defendant himself has an easement therein. *Blake* v. *Haver*, 53 Me. 430.

That there are incumbrances upon the land purchased will not avail the vendee, in possession under his contract, as a defense to an action by the vendor. *Lauer* v. *Lee*, 42 Penn. St. 165. Irregularities in a guardian's sale of land are no defense to an action by the purchaser for its recovery. *Farrell* v. *Hennesy*, 21 Wis. 632. Defects in the proceedings of a railroad company to acquire the title to land will not defeat an ejectment by the company for such land. *Hannibal, etc., R. R. Co.* v. *Moore*, 45 Mo. 443.

The weakness of the plaintiff's title will not avail a defendant who fraudulently induced the purchase (*Lane* v. *Reynard*, 2 Serg. & R. 64); nor can one who shows no title in himself take advantage of any technical defects in such title. *Zeringue* v. *Williams*, 15 La. Ann. 76. A mere intruder cannot set up against the former owner's grantee any right which such owner may still have under the statute of frauds. *Ryan* v. *Tomlinson*, 39 Cal. 639.

It is no defense to an action by a purchaser of land on execution, that the defendant in the execution had personal property sufficient to satisfy it. *Lathrop* v. *Singer*, 39 Barb. 396.

The proceedings and judgment in a suit for forcible entry and detainer of premises are no bar to a suit in ejectment for the same premises (*Carter* v. *Scaggs*, 38 Mo. 302); nor is a judgment in an action of trespass wherein the title was put in issue, but was not fully tried and was not necessary to be determined, a bar to a subsequent suit for the recovery of possession of the same premises (*Hargus* v. *Goodman*, 12 Ind. 629); nor is a judgment in a partition suit, which, after the death of a defendant, was revived against his administrator, but not against his heirs, a bar to an ejectment by them. *DeMill* v. *Port Huron, etc., Co.*, 30 Mich. 38.

A mutual mistake in the description in a deed is no defense to an action to which the grantees are not parties. *Hicks* v. *Sheppard*, 4 Lans. 335.

A vendee under an executory contract cannot avail himself of the presumption of payment arising under the statute of limitations as a defense, but must prove it. *Brady* v. *Begun*, 36 Barb. 533.

A purchase of land under an execution is no defense to an action for the recovery of such land, if the time for redemption has not expired (*McMinn* v. *O'Connor*, 27 Cal. 238); nor is a title in the defendant, acquired after the commencement, a defense thereto. *Scott* v. *Crego*, 47 Barb. 595; *Tustin* v. *Faught*, 23 Cal. 237; *Moore* v. *Tice*, 22 id. 513.

A mortgagor cannot set up as a defense to an action by his mortgagee a title acquired by him subsequent to the mortgage (*Doe* v. *Vickers*, 4 Ad. & Ell. 782); nor a prior mortgage executed by himself. *Doe* v. *Clifton*, 4 Ad. & Ell. 809.

It is provided by statute in some of the American States that even a transfer of his title by the plaintiff pending the suit shall not defeat a recovery, but it may be continued in the name of the original plaintiff, or his grantee may be substituted. *Moss* v. *Shear*, 30 Cal. 468; *Barstow* v. *Newman*, 34 id. 90; *Van Rensselaer* v. *Owen*, 48 Barb. 61.

§ 3. **Adverse possession.** The subject of adverse possession as a foundation of title has already received some attention in art. 4 of this title, but its importance in this connection gives it a right to still further consideration. We have seen that possession of real estate is *prima facie* evidence of title thereto; and that, if adverse and continued for a sufficient length of time, it creates or establishes a complete title as against every one, which will sustain an action of ejectment by the possessor, or defeat such action when brought against him. A prior possession alone is sufficient to enable him to maintain or defend such an action as against any one who has not a better title; but such a possession will not prevail against the holder of the record title until

it has ripened into a complete title, and that can be effected only by the application to it of the statutes of limitations. The great importance to communities as well as individuals, of putting an end to controversies in respect to real as well as personal property, and quieting titles thereto, has been recognized everywhere and from time immemorial, and the desired remedy has been sought in the enactment of statutes limiting the times in which actions must be brought for the enforcement of particular rights. Whether such statutes operate by way of vesting title, or merely by way of barring remedies, is of little importance, provided their object is attained.

The first thing requisite to confer upon a possession the capacity to ripen into a title is, that it be adverse, that is, hostile to and inconsistent with the title of the true owner. What will make a possession adverse is in many of the States fixed by statute, but in others the statutes are silent on the subject, and the question is to be settled by general principles which have been sanctioned and established by the courts.

To make a possession adverse, it must, as a general rule, have commenced under a color or claim of title. What is such color or claim of title has already been sufficiently explained. A possession commenced under an acknowledgment of the rights of the real owner will presumptively retain its original character as a possession in subservience to his rights, through any number of successive occupations. The character of such an occupation so commenced may, however, be changed and become adverse, but this can be done only by some affirmative action on the part of the occupant, and to establish it strict proof will be required and an adequate cause must be shown, such as the accession of another title, or some other circumstance furnishing a motive. It has been held in many cases that to make possession without paper title a bar in ejectment it must be shown by strict proof to have been hostile in its inception. *Brandt* v. *Ogden*, 1 Johns. 156; *Jackson* v. *Parker*, 3 Johns. Cas. 124; *Kirk* v. *Smith*, 9 Wheat. 241. But even this rule does not prevent one who entered in subservience to the true title from claiming under a colorable title afterward acquired, because the acquiring and claiming under such a title renders his possession hostile from that time, and the statute then begins to operate upon it. To make a possession so commenced adverse, there must be on the part of the possessor a clear, positive, explicit, and continued disclaimer and disavowal of the title under which he entered, and an assertion of right on his own part, notice of which must be brought home to the owner. *Floyd* v. *Mintsey*, 7 Rich. 181; *Hall* v. *Stevens*, 9 Metc. 418; *Day* v. *Cochran*, 24 Miss. 261; *Clarke* v.

McClure, 10 Gratt. 305; *Long* v. *Mast*, 11 Penn. St. 189; *Harrison* v. *Pool*, 16 Ala. 167.

As the possession derives its character from the intent with which it is taken and is held, an intent to claim adversely is essential and must appear; yet it need not in all cases be manifested by any express declaration to that effect, but it may be sufficiently established by the absence of any direct acknowledgment of the rights of the real owner, or of any open or tacit disavowal of right on the part of the occupant. The burden of proving that the possession is adverse is, however, upon him who claims it to be so. *Russell* v. *Davis*, 38 Conn. 562.

To give effect to a possession taken under color and claim of title and continued for the statutory period, as a bar to an action for the recovery of the land, the color of title must be *prima facie* valid or purport to be valid; but it is entirely immaterial how defective that title may be in fact, or whether it is based on a written or a parol contract, or any contract at all. Even knowledge on the part of the claimant of the invalidity or fraudulent nature of his claim, does not destroy its effect in aid of an adverse possession. *LaFrombois* v. *Jackson*, 8 Cow. 589; *Munro* v. *Merchant*, 26 Barb. 383; *Humbert* v. *Trinity Church*, 24 Wend. 587; *Northrop* v. *Wright*, 7 Hill, 476.

Color of title is not usually held to be essential, except to sustain a constructive adverse possession. *Wells* v. *Jackson Manf. Co.*, 48 N. H. 491. It is, however, made essential by statute in some of the States, and in some the possession must be based upon good faith.

Ordinarily, neither a deed nor any other documentary semblance of right in the defendant is necessary, where he has actual possession, and any other evidence of an adverse claim exists. This possession must be inconsistent with the title of the true owner who is excluded, and the claim of title must be exclusive of the rights of all others, and it must be open, definite and notorious (*Jackson* v. *Berner*, 48 Ill. 203; *Carroll* v. *Gillion*, 33 Ga. 539; *Beatty* v. *Mason*, 30 Md. 409; *Thomas* v. *Babb*, 45 Mo. 384); and it must be continuous and uninterrupted in the claimant or his grantors. *Bowman* v. *Lee*, 48 Mo. 335; *Fugate* v. *Pierce*, 49 id. 441; *Dixon* v. *Cook*, 47 Miss. 220. He who obtains possession by a forcible ouster of the lawful owner, and he who enters upon a vacant possession claiming for himself on any pretense or color of title, are equally protected by the statute.

The possession and claim of a vendee under an executory contract of purchase cannot be in any sense adverse to the title of his vendor, until he has performed the conditions of his contract (*Jackson* v. *Camp*, 1 Cow. 605; *Catlin* v. *Decker*, 38 Conn. 262); and then it may become adverse (*Briggs* v. *Prosser*, 14 Wend. 227; *Vrooman* v. *Shep-*

herd, 14 Barb. 441); but he may always hold adversely as against all others. *Whitney* v. *Wright*, 15 Wend. 171.

Yet, if after taking possession under the contract, he takes a deed from a third party and openly claims under that, his possession becomes adverse from that time (*Jackson* v. *Johnson*, 5 Cow. 74); and if the vendor conveys to another, in violation of his contract, the first vendee in possession is absolved from his relation as such, and at liberty to purchase and set up title in himself. *Logan* v. *Steele*, 7 Monr. 101.

A person who holds the possession of land under a license from the owner cannot set up an adverse possession, any more than one taking under a lease (*Luce* v. *Carley*, 24 Wend. 451; *Baker* v. *Mellish*, 10 Ves. Jr. 544; *Phillips* v. *Pearce*, 5 Barn. & Cres. 433); nor can his grantee, a license not being transferable. *Babcock* v. *Utter*, 1 Abb. Ct. App. 27; 32 How. Pr. 439; 1 Keyes, 397.

Heirs who obtain exclusive possession of the lands of their ancestor cannot set up an adverse claim as against their co-heirs. *Phelan* v. *Kelly*, 25 Wend. 389.

While occupying under his lease, a tenant cannot originate a possession in his own favor adverse to his landlord, nor continue an adverse possession previously commenced (*Corning* v. *Troy Iron & Nail Fac.*, 34 Barb. 485; 22 How. Pr. 217; *Tyler* v. *Heidorn*, 46 Barb. 439); and yet a subsequent grant in fee to him will remove that disability, notwithstanding a reservation of a quit rent. *People* v. *Trinity Church*, 22 N. Y. (8 Smith) 44; *People* v. *Van Rensselaer*, 9 N. Y. (5 Seld.) 291.

One who is in fact a tenant, paying rent, cannot make a conveyance of the demised premises which will operate as the basis of an adverse possession.

No disseizin of the tenant of a particular estate and occupation under it, however long continued, will affect the right of the reversioner. *Jackson* v. *Schoonmaker*, 4 Johns. 390; *Miller* v. *Ewing*, 6 Cush. 34; *Salmons* v. *Davis*, 29 Mo. 176. Even where a tenant for life attempts to convey the estate in fee, adverse possession does not commence until the death of such life tenant (*Gernet* v. *Lynn*, 31 Penn. St. 94; *Pinckney* v. *Burrage*, 2 Vroom, 21); and if a husband and his wife are disseized of the wife's lands, the adverse possession during the husband's life does not bar the wife or her representatives after his death (*Gregg* v. *Tesson*, 1 Black, 150); nor will a conveyance thereof by the husband, in which she does not join, have that effect. *Munnerlyn* v. *Munnerlyn*, 2 Brev. 2; *Miller* v. *Miller*. 1 Meigs, 484.

If one who has already conveyed all his interest in land by warranty

deed afterward gives a lease of an easement thereon, such lease, though void, is sufficient to lay the foundation of an adverse possession as against the grantee of the land, if followed by actual occupation, or acquiesced in by him. *Wilklow* v. *Lane*, 37 Barb. 244. The grantor himself, if he continues in the actual adverse possession of the land granted for the full term of the statute, will acquire title as against his grantee. *Traip* v. *Traip*, 57 Me. 268. Even a grantor by quit claim deed may show that, after he conveyed, he was put in charge of the land as agent of the real owner. *Franklin* v. *Dorland*, 28 Cal. 175.

A mere permissive enjoyment of land, or of an easement thereon, does not confer any adverse right. *Babcock* v. *Utter*, 1 Abb. Ct. App. 27; 1 Keyes, 397; *Kirk* v. *Smith*, 9 Wheat. 241; *Medford* v. *Pratt*, 4 Pick. 222; *Thomas* v. *Marshfield*, 13 id. 240; *Gayetty* v. *Bethune*, 14 Mass. 49; *Plimpton* v. *Converse*, 44 Vt. 158.

The claim made must be of the entire title, exclusive of the title of any other person. *Smith* v. *Burtis*, 9 Johns. 180; *Howard* v. *Howard*, *Jr.*, 17 Barb. 663. And there must be an actual use and occupation of the premises by the claimant, such that the rightful owner can maintain an action to recover it. *Huntington* v. *Whaley*, 29 Conn. 391.

As a general rule, the extent of the adverse possession must be marked by definite boundaries. Where the claim is founded upon a written instrument, or a judgment, or decree, that limits and defines the possession (*Fugate* v. *Pierce*, 49 Mo. 441); but in other cases it is held that there must be an actual occupation, definite, positive and notorious; and the best, though not the only evidence of that, is a substantial inclosure. *Bailey* v. *Irby*, 2 Nott & McC. 343; *Gibson* v. *Martin*, 1 Harr. & J. 545; *Cheney* v. *Ringgold*, 2 id. 87; *Davidson's Lessee* v. *Beatty*, 3 Harr. & McH. 621; *Knowlton* v. *Smith*, 36 Mo. 507; *Jackson* v. *Warford*, 7 Wend. 62.

This inclosure need not be altogether artificial, but a river or other natural barrier may constitute it in part. *Becker* v. *Van Valkenburgh*, 29 Barb. 319; *St. Louis* v. *Gorman*, 29 Mo. 593. An adverse possession bounded on a river or stream will not be carried constructively to the center of the stream, without any actual adverse occupancy of the land under water, but will stop at the bank or line of actual occupation. *Corning* v. *Troy Iron & Nail Fac.*, 34 Barb. 529.

By statute in some of the States the effect of an adverse possession not founded upon a written instrument, or a judgment, or decree, is limited to lands which have either been substantially inclosed, or been cultivated and improved; and the courts of New York hold that such inclosure, to be sufficient, must be of the lot claimed by itself, and not with other lands. Under the statutes of Ohio and Kentucky, other visi-

ble and notorious acts of ownership exercised over the premises in controversy, indicating a claim of title, such as entering, making improvements, raising crops, cutting and selling trees and the like, have been held sufficient without fencing. *Ellicott* v. *Pearl*, 10 Peters, 412; *Moss* v. *Scott*, 2 Dana, 275. Where the property is so situated as not to admit of any permanent useful improvement, neither actual occupation and cultivation, nor residence, are necessary, but public acts of ownership exercised by the claimant, such as he would exercise over property claimed in his own right and not over that not so claimed, are sufficient. *Ewing* v. *Burnet*, 11 Peters, 41. The weight of authority is, that, in the absence of statutory provisions to the contrary, a substantial inclosure is essential.

Actual residence of the claimant on the land is not usually deemed necessary to constitute an adverse possession, but it is required by statute in some of the States.

A constructive adverse possession will extend over the whole of the tract included in the color of title, though but part be actually occupied. *Woods* v. *Banks*, 14 N. H. 101; *Jackson* v. *Camp*, 1 Cow. 605; *Munro* v. *Merchant*, 28 N. Y. (1 Tiff) 9; *Thompson* v. *Cragg*, 24 Tex. 582; *Schultz* v. *Lindell*, 30 Mo. 310; *Hinchman* v. *Whetstone*, 23 Ill. 185; *Prescott* v. *Nevers*, 4 Mason, 330. But where a large tract of land, covered by the color of title, is divided into lots, the adverse possession of one lot will not extend over the others. *Jackson* v. *Woodruff*, 1 Cow. 277; *People* v. *Livingston*, 8 Barb. 253.

An exclusive possession by one tenant in common of all the land on one side of a line agreed upon between him and his co-tenants, for over twenty years before suit, he paying taxes and exercising other acts of ownership, is a bar to a recovery of such part by his co-tenants. *Rider* v. *Maul*, 46 Penn. St. 376. Where owners of adjoining lands build a fence between them upon the assumed boundary line and each holds and occupies up to it on his own side, claiming it as the true line, their possession is adverse and will ripen into a valid title (*Burrell* v. *Burrell*, 11 Mass. 298; *Stuyvesant* v. *Tompkins*, 9 Johns. 61; *Jones* v. *Smith*, 64 N. Y. (19 Sick.) 180; *Holton* v. *Whitney*, 30 Vt. 410; *Abbott* v. *Abbott*, 51 Me 575; *Mode* v. *Long*, 64 N. C. 433); and so also, if they agree to hold up to a particular line (*Tamm* v. *Kellogg*, 49 Mo. 118); but not so where they located the fence merely for convenience, not claiming it as the line (*Brown* v. *Cockerell*, 33 Ala. 45; *Howard* v. *Reedy*, 29 Ga. 154); nor where it is crooked, or divides only a part of their adjoining possessions, and there is a fence on the true line dividing other portions, or there is on a part no fence, and there is no

agreement to abide by it as the true line. *Lamb* v. *Coe*, 15 Wend 642; *Irvine* v. *Adler*, 43 Cal. 559.

Where there is a mixed possession, the legal seizin will be adjudged to be in him who has the better title. *Langdon* v. *Potter*, 3 Mass. 215.

It has been held in some of the States that even an entry upon and occupation of land by a party, outside of his proper bounds, by mistake, supposing it to be within them, is to be deemed adverse, and if continued it will inure to become a complete title (*Enfield* v. *Day*, 7 N. H. 457; *Crary* v. *Goodman*, 22 N. Y. 8 [Smith] 170; *Hunter* v. *Chrisman*, 6 B. Monr. 463); but the contrary is held in Missouri and Iowa. *Thomas* v. *Babb*, 45 Mo. 384; *Grube* v. *Wells*, 34 Iowa, 148.

The last requisite which we have to consider is, that the adverse possession have continued for the full time prescribed by the statute of limitations. *Abel* v. *Hutto*, 8 Rich. 42.

The statutes of limitation now existing in the different American States derive their origin, and to a considerable extent their form from an English statute of the reign of James I, and the decisions of the English courts are valuable aids in construing and applying them. These statutes, although usually in terms applying only to legal remedies, are yet no less obligatory upon courts of equity than upon courts of law.

The times fixed by them for the quieting of titles to real estate are not uniform in the different States, but the most usual limitation is twenty years, especially where adverse possession is held under a mere claim, without deed or other color of title.

Every reasonable intendment will be made in support of an undisputed possession for fifty years under a judicial determination and a partition deed, even though the existence of a life estate in another prevented the party entitled from bringing ejectment. *Willetts* v. *Mandlebaum*, 28 Mich. 521.

A widow's possession of the family residence under a claim of ownership, for forty years after the death of her husband, has been held to bar the heirs of the husband. *Hogan* v. *Kurtz*, 1 McArth. 135.

Possession for twenty years is no bar to an action by the real owner, unless held under color or claim of title. *Wilkes* v. *Elliott*, 5 Cranch's C. C. 611. Possession for less than twenty years is not a bar in many of the States *Robinson* v. *Phillips*, 1 N. Y. Sup. (T. & C.) 151; 65 Barb. 418; 56 N. Y. (11 Sick.) 634; *Den* v. *Wright*, 2 Halst. 175. In some the limitation is twenty-one years, in some it is fifteen years, in some ten, and in others five. A distinction is also made in some of the States between claims which are not and those which are founded

upon a written instrument, or a judgment, fixing the limitation in the latter case at ten or a less number of years. To give all the provisions of these various statutes would occupy too much space in this article, but this brief reference to them is sufficient for our present purpose.

In Missouri it is held that an adverse possession which is actual, visible, undisturbed and continuous for ten years under a claim of title is sufficient. *Doan* v. *Sloan*, 42 Mo. 106; *Wall* v. *Shindler*, 47 id. 282.

In North Carolina, an actual adverse possession for seven years of part of a lappage, by the claimant under a junior title, confers a valid title to the whole lappage, if the claimant under the elder title had no actual possession. *Kerr* v. *Elliott*, Phill. 601.

It is not essential that the continuity of possession be by the same party and under the same right; yet the ouster must be continued uninterruptedly during the whole time. If the premises become vacant even for a day, the owner will be deemed in the constructive possession by reason of his title. An open entry, claim or action by the owner within the prescribed time will defeat the efficacy of the prior possession (*Den* v. *Mulford*, 1 Hayw. 320; *Den* v. *Ridley*, 2 N. C. Law Rep. 397, 400; *Pederick* v. *Searle*, 5 Serg. & R. 240); and even the interruptions of simple trespassers have in some cases been held to break the continuity. An occasional cutting of timber on the land by the disseizor during the statutory period does not constitute a continued occupancy.

If the possession is under color of title, the continuity of possession may consist of actual possession of part and constructive possession of the residue of the tract, but if it is under a simple claim of title, without any conveyance or other written instrument, it must be all the time the same in point of locality.

As a general rule, in order to make the successive possessions of different persons operate as a bar, there must have existed a privity between them. *Wheeler* v. *Moody*, 9 Tex. 372; *Johnson* v. *Nash*, 15 id. 419; *Winn* v. *Wilhite*, 5 J. J. Marsh. 521; *Schrack* v. *Zubler*, 34 Penn. St. 38; *Simpson* v. *Downing*, 23 Wend. 316; *Christy* v. *Alford*, 17 How. (U. S.) 601; *Day* v. *Wilder*, 47 Vt. 584; *Shaw* v. *Nicholay*, 30 Mo. 99; *Shuffleton* v. *Nelson*, 2 Sawy. 540. The privity of estate required is such as arises from the relation of ancestor and heir, grantor and grantee, or devisor and devisee.

As against a purchaser at a tax sale, the party in possession, to make out the statutory time, may embrace the time which has elapsed since the sale and prior to the confirmation. *Buckingham* v. *Hallett*, 24 Ark. 519. It has been held in Kentucky that an adverse possession under a survey previous to the patent may be connected with the pos-

session after the patent issued, so as to bring the case within the statute (*Walden* v. *Heirs of Gratz*, 1 Wheat. 292); and even that a surrender by the party first in possession to others, will enable the latter to take advantage of his possession to make up the statutory time, such possession being all the time adverse to the true owner. *Shannon* v. *Kinney*, 1 A. K. Marsh. 4. In Connecticut it has been held that this continuity may be effected by any conveyance, agreement or understanding, which has for its object a transfer of the rights of the possessor or his possession, accompanied by an actual transfer of possession. *Smith* v. *Chapin*, 31 Conn. 530.

The adverse possession of a husband cannot be connected with that of his widow after his death, so as to avail her (*Hildreth* v. *Thompson*, 16 Mass. 191; *Sawyer* v. *Kendall*, 10 Cush. 241); except where he claimed in her right and she continued in possession. *Doe* v. *Wing*, 6 Carr. & P. 538. Yet, it is held that a husband may avail himself of his wife's adverse possession, in defense of an action by one to whom within the statutory limit he had released the property. *Steel* v. *Johnson*, 4 Allen, 425.

The possession of a defendant in execution may be tacked to that of the purchaser (*Scheetz* v. *Fitzwater*, 5 Penn. St. 126); and in Tennessee that of an intestate to that of his administrator. *Moffit* v. *McDonald*, 11 Humph. 457. The contrary is held in Maine. *Bullen* v. *Arnold*, 31 Me. 583.

There are, however, decisions in several States that the adverse possessions of different occupants may be added together to make up the entire term of limitation, though not proved to be connected. *Fanning* v. *Willcox*, 3 Day, 258; *McCoy* v. *Dickinson Coll*, 5 Serg. & R. 254.

Statutes of limitation usually contain saving clauses in favor of persons under any disability, such as coverture, infancy, lunacy and the like, and the time of the statute does not run during the continuance of the disability. As a general rule, such saving clauses apply only to cases where the disability existed at the time when ouster occurred, or adverse possession commenced, and the right of action accrued. *Mercer* v. *Selden*, 1 How. (U. S.) 37; 17 Peters, 61; *Lewis* v. *Barksdale*, 2 Brock. Marsh. 436; *Walden* v. *Gratz*, 1 Wheat. 292; *Roberts* v. *Moore*, 9 Am. Law Reg. 26; *Hayman* v. *Keally*, 3 Cranch's C. C. 325; *Seawell* v. *Bunch*, 6 Jones' Law, 197; *Tracy* v. *Atherton*, 36 Vt. 503; *Reimer* v. *Stuber*, 20 Penn. St. 458; *Stephens* v. *McCormick*, 5 Bush (Ky.), 181. An adverse possession commenced during the life-time of the ancestor, who was under no disability, is not affected by his death and the descent of his estate to a minor heir; nor is a disseizin, com-

menced when the owner was sane, affected by his subsequent insanity during the period of limitation; nor is one commenced when the owner was a *feme sole* affected by her subsequent coverture. *Becker* v. *Van Valkenburgh*, 29 Barb. 324; *Allis* v. *Moore*, 2 Allen, 306; *Currier* v. *Gale*, 3 id. 328. The rule is otherwise in Georgia. *Everett* v. *Whitfield*, 27 Ga. 159.

It has been held in some cases that successive disabilities in the same person without intermission will prevent the running of the statute, but that rule is not generally adopted.

To avail as a defense, the statute of limitations must be pleaded (*Orton* v. *Noonan*, 25 Wis. 672); but certain parties, by reason of the relations existing between them and the plaintiff, or of their privity with persons sustaining such relationship, are estopped from pleading it. Thus, the relation of landlord and tenant, so long as it exists, estops the tenant and any one succeeding to his rights from denying the title of the landlord. *Jackson* v. *Davis*, 5 Cow. 123; *Van Rensselaer* v. *Van Wie*, 23 Wend. 531.

A tenant may, however, show that the landlord's title has terminated, and claim under another title from the time of its termination. *Nellis* v. *Lathrop*, 22 Wend. 121. He may also surrender possession, and afterward regain it and set up an adverse title. *Hill* v. *Hill*, 4 Barb. 419.

If an execution debtor is a mere tenant for life or years, the purchaser of his title at the sale is subject to the same estoppel as he was. *Jackson* v. *Graham*, 3 Caines, 188; *Jackson* v. *Town*, 4 Cow. 599. A tenant in possession of a life estate who purchases the interest of one of several *cestuis que trust* of the reversion, cannot suffer the land to be sold for a municipal assessment and bid it in, and set up that title as adverse to that of the other *cestuis que trust*. *Burhans* v. *Van Zandt*, 7 N. Y. (3 Seld.) 523.

But this rule as to the estoppel of a tenant applies only where the conventional relation of landlord and tenant exists by contract, and some rent or return is in fact reserved, and not where it arises by mere operation of law, as in case of an assessment lease; and if one holding such a lease conveys the land in fee, his grantee, by occupying for the statutory time after the expiration of his lease, will acquire a title by adverse possession, which he may set up against the owner. *Sands* v. *Hughes*, 53 N. Y. (8 Sick.) 287.

A judgment debtor who remains in possession of real estate after it has been sold on execution, will be presumed to hold under the title of the purchaser; and neither he, nor any one succeeding to his possession under a prior judgment, can be deemed to hold adversely, as

against the purchaser at the sheriff's sale. *Cook* v. *Travis*, 20 N. Y. (6 Smith) 400.

Nor can one who has recognized the title of the plaintiff, by offering to purchase from him, set up adverse possession as against him (*Jackson* v. *Britton*, 4 Wend. 507; *Jackson* v. *Croy*, 12 Johns. 427; *Lovell* v. *Frost*, 44 Cal. 471); though he may show that such offer was made under a mistake, and that plaintiff had no title (*Jackson* v. *Cuerden*, 2 Johns. Cas. 353); and if a party in possession, claiming under a deed which is in some respects defective, seeks to quiet his title by purchasing that of one holding a subsequent deed, he does not thereby abandon his previous title so as to bar the defense of adverse possession founded thereon (*Jackson* v. *Newton*, 18 Johns. 355); nor would he do so by obtaining the conveyance of an outstanding adverse claim. *Northrop* v. *Wright*, 7 Hill, 476.

And yet, if a person in possession accepts a deed from one claiming adversely, he will generally be deemed to have abandoned whatever possessory title he had, and to hold under such deed. *Croan* v. *Joyce*, 3 Bush (Ky.), 454.

One whose possession is in subservience to the title of reversioners cannot purchase and set up an adverse title against them.

A person in possession does not, by acknowledging the title of a party under whom he did not enter, estop himself or any one deriving possession through him from disclaiming holding under such party (*Jackson* v. *Leek*, 12 Wend. 105); but one who enters under an agreement to purchase cannot, except under the circumstances already noticed, dispute the title of him under whom he entered. A grantee in fee, however, does not owe any allegiance to his grantor which will prevent him from setting up an adverse possession. But if the deed in fee under which he holds, in fact conveys only an estate for the life of another, the grantee cannot, after the death of the life tenant, set up adverse possession under the deed against the reversioner's grantee. *Learned* v. *Tallmadge*, 26 Barb. 443.

One who has conveyed property with covenants of warranty cannot, on afterward inheriting such property, set up adverse possession against his grantee; but a purchaser at a sheriff's sale against such grantor is not estopped (*Jackson* v. *Bradford*, 4 Wend. 619); nor can one who holds under the judgment debtor, subsequent to the lien of a judgment, set up his title as adverse to that of the purchaser at sheriff's sale under such judgment. *Jackson* v. *Collins*, 3 Cow. 89; *Jackson* v. *Hinman*, 10 Johns. 292.

Where several persons have a joint claim to property, one of them cannot buy in an outstanding title and set it up against his co-tenants

(*Van Horne* v. *Fonda*, 5 Johns. Ch. 388); but he may buy his co-tenants' interest at sheriff's sale, and then claim to hold adversely (*Jackson* v. *Brink*, 5 Cow. 483); and one who purchases and takes possession of land, supposing that he gets the whole title, may hold adversely to others who have an interest in common. *Jackson* v. *Smith*, 13 Johns. 406. A mortgagee, executor, trustee or tenant for life, having only a limited interest, cannot set up his possession against the other party interested.

But if one tenant in common, joint tenant or coparcener enters the common property notoriously as sole owner, and exercises control as such, he may thereby disseize his co-tenant and acquire a title by adverse possession against his co-tenant. *Humbert* v. *Trinity Church*, 24 Wend. 587; *Brackett* v. *Norcross*, 1 Greenl. 89; *Hargrave* v. *Powell*, 2 Dev. & Batt. 97.

If a disseizor relinquishes to one of several co-owners of the property his share thereof, he thereby puts all the co-owners in possession, and cannot subsequently set up previous adverse possession against them. Angell on Lim., § 434.

The statute of limitations runs against all persons alike, unless they are expressly exempted from its operation; but the commencement of an action, or an entry made by the owner before it has fully run, is usually sufficient to prevent its becoming a bar, even though the plaintiff in such action suffers defeat upon some ground not affecting the merits.

§ 4. **Outstanding title.** As the plaintiff in ejectment must recover on the strength of his own title, it logically follows that the defendant may resist his suit by any title, either held by himself or outstanding, which will show that the plaintiff lacks an element which is essential to his right of recovery. *Green* v. *Scarlet*, 3 Grant, 228. It is, therefore, a general rule, a few exceptions to which will be hereafter noted, that the defendant may show that there is an outstanding title to the premises in controversy, which is paramount to that of the plaintiff, and it is not necessary for him to show that he holds it himself, or in any way to connect himself with it. *Roe* v. *Baxter*, 33 Ga. 81; *Love* v. *Simms*, 9 Wheat. 515; *Henderson* v. *Tennessee*, 10 How. (U. S.) 311; *Stuart* v. *Dutton*, 39 Ill. 91; *Townsend* v. *Downer*, 32 Vt. 183; *Russell* v. *Erwin*, 38 Ala. 44; *Connelly* v. *Doe*, 8 Blackf. 320; *Nixon* v. *Porter*, 38 Miss. 401.

To avail as a defense, such title must be out of the plaintiff at the commencement of the suit (*Raynor* v. *Timerson*, 46 Barb. 518); and it must be a present, subsisting and operative legal title, on which the owner could recover if asserting it by action. *McDonald* v. *Schneider*, 27 Mo. 405; *Masterson* v. *Cheek*, 23 Ill. 72; *Sutton* v. *McLeod*, 29

Ga. 589; *Atkins* v. *Lewis*, 14 Gratt. 30; *Dickinson* v. *Collins*, 1 Swan, 516; *Sharp* v. *Johnson*, 22 Ark. 79. If barred by the statute of limitations, it will not avail. *Heard* v. *Baird*, 40 Miss. 793; *Thompson* v. *Wheatley*, 5 Sm. & M. 499; *Chapman* v. *Del., Lack. & W. R. R. Co.*, 3 Lans. 261. Where the plaintiff's prior possession has ripened into a perfect title, the defendant cannot defeat it by showing an outstanding title in another with which he does not connect himself. *Stacy* v. *Bostwick*, 48 Vt. 192.

If such title be in a stranger, it must be good against both parties to the suit. *George's Creek Coal Co.* v. *Detmold*, 1 Md. 225. If the legal title be outstanding, a recovery cannot be had on the equitable title. *Thompson* v. *Lyon*, 33 Mo. 219.

It is a good defense to an action by a landlord against his tenant. that the title of the landlord has passed out of his hands during the term; but that it has passed to a stranger by a sale and conveyance for taxes is not sufficient. *Chase* v. *Dearborn*, 21 Wis. 57. A comptroller's deed to the defendant, on a sale for taxes, has been held a good defense if the description in it covers the land in controversy (*Thompson* v. *Burhans*, 61 Barb. 260; 61 N. Y. [16 Sick.] 52, reversed); and so is a title in the defendant by conveyance of the unexpired term under an assessment lease, if such lease is valid and possession has been taken under it. *Bedell* v. *Shaw*, 59 N. Y. (14 Sick.) 46. A purchase of the title by the defendant at an administrator's sale, under a valid decree of the probate court, duly confirmed, is a good defense to an ejectment by heirs or devisees (*Warnock* v. *Thomas*, 48 Ala. 463); or where such sale was to pay a mortgage and other debts, it is a good equitable defense to an action by one holding under the deceased mortgagor. *Russell* v. *Whitely*, 59 Mo. 196. Even though the sale was void, such a purchase and possession under it, and paramount title in those under whom the defendant claims is a good defense. *Oetgen* v. *Ross*, 54 Ill. 79.

Title in the defendant to an undivided part of the land is a good defense (*Roe* v. *Johnson*, 30 Ga. 611); even though purchased pending the suit. *Carpentier* v. *Small*, 35 Cal. 346.

A judgment in foreclosure will be a valid defense as an outstanding title, if the record of the mortgage on which it was rendered is older than the judgment under which the plaintiff claims. *Hall* v. *Lance*, 25 Ill. 278.

As the plaintiff must show a present right of possession as well as a good title, an outstanding life estate is a good bar to his action (*Batterton* v. *Yoakum*, 17 Ill. 288); and so is an outstanding mortgage term, even as between the heir and a devisee claiming subject to the charge.

Barnes v. *Crow*, 4 Bro. C. C. 2. Such a term in a trustee is a bar to an action by the *cestui que use*, unless facts are shown raising a presumption that it has been surrendered. *Goodtitle* v. *Jones*, 7 Term R. 47. Mere lapse of time, if less than twenty years, will not raise a presumption of such surrender (*Doe* v. *Calvert*, 5 Taunt. 170); and to raise such a presumption as to a term assigned to attend the inheritance, there must have been a dealing with the estate in such a manner as reasonable men would not have dealt with it, unless the term had been put an end to. *Garrard* v. *Tuck*, 8 C. B. 231; 13 Jur. 871; 18 L. J. C. P. 338.

Where the plaintiff claims under a paper title, the effect of an outstanding title is to show that nothing passed to the plaintiff by his paper title. *Marsh* v. *Brooks*, 8 How. (U. S.) 223.

If the plaintiff is entitled to the possession, notwithstanding the legal title is in another, as in cases of trust, an outstanding title in a stranger will not be a good defense even to one who acquired possession honestly and peaceably under color of title. *Fowler* v. *Whiteman*, 2 Ohio St. 270.

A conveyance by plaintiff of the premises in controversy pending the suit does not usually defeat the suit, but it can be set up as a defense in Maryland (*Cresap* v. *Hutson*, 9 Gill, 269); and when the plaintiff claims under two lessors, a conveyance of his legal estate by one of them, and a former recovery against the other, will defeat the action. *Doe* v. *Roe*, 30 Ga. 632. Where a grant of land executed by several tenants in common is void by reason of an actual possession by a third person, claiming title under a title adverse to that of the grantors, the grantee, in order to maintain an action of ejectment, under section 111 of the Code, must bring it in the name of all the grantors or their heirs or legal representatives. *Hasbrouck* v. *Bunce*, 62 N. Y. (17 Sick.) 475.

An outstanding title in a stranger is no defense to an ejectment in Vermont, even though the plaintiff claims only under a prior actual possession not apparently wrongful. *Perkins* v. *Blood*, 36 Vt. 273.

When both parties claim title from a common source, the defendant cannot set up an outstanding paramount title with which he had no connection (*Griffin* v. *Sheffield*, 38 Miss. 359); but he may show a prior deed to himself, and that he conveyed to a third party for a good cause, without notice of plaintiff's right. *Newlin* v. *Osborne*, 2 Jones' Law, 163.

A deed which is fraudulent on its face, and therefore void, cannot be used to defeat a recovery in ejectment as the foundation of an outstanding title. *Forsythe* v. *Hardin*, 62 Ill. 206.

A defendant whose title the plaintiff has acquired by *mesne* conveyances cannot set up an outstanding title in a third person as a defense. *Mathews* v. *LaCompte*, 24 Mo. 545; *Harrison* v. *Taylor*, 33 id. 211.

A defendant who is in possession under a contract to purchase, which has been rescinded, cannot object to the vendor's want of title, nor set up an outstanding title (*Walker* v. *Williams*, 30 Miss. 165); nor can a vendee who has refused to accept a deed under his contract set up an outstanding mortgage as a defense. *Pierce* v. *Tuttle*, 53 Barb. 155.

In an action by a purchaser of the defendant's rights on execution, the latter cannot set up title in a third party (*Parshall* v. *Shirts*, 54 Barb. 99; *McDonald* v. *Badger*, 23 Cal. 393; *Arnold* v. *Gorr*, 1 Rawle, 223); nor can one who came into possession under the execution debtor, without title or collusively, do so. *Sherry* v. *Denn*, 8 Blackf. 542; *Hobson* v. *Doe*, 4 id. 487. But if the execution debtor abandons the premises sold after the sale, and subsequently returns to them, he may show an outstanding title under which he then holds. *Hayes* v. *Bernard*, 38 Ill. 297.

A person who is in possession as a mere trespasser cannot protect himself in Iowa by showing an outstanding title in a stranger (*Williams* v. *Swetland*, 10 Iowa, 51); nor in Nevada, except as a means of showing title or right of possession out of the plaintiff. *Mallett* v. *Uncle Sam Gold, etc., Co.*, 1 Nev. 188. A prior peaceable possession in the plaintiff will prevail in such a case (*Christy* v. *Scott*, 14 How. [U. S.] 282), and the defendant cannot set up an anterior possession by a stranger. *Piercy* v. *Sabin*, 10 Cal. 22. A mere wrong-doer cannot set up the title of a *cestui que trust* against the trustee, or against the holder of the legal estate under a conveyance from such trustee, though made in abuse of his trust. *Townsend* v. *Roy*, 9 Phil. 120; *Brolaskey* v. *McClain*, 61 Penn. St. 146. Where by law the legal title of a trust estate vests in the *cestui que trust*, the defendant cannot set up against him the title of the trustees. *O'Neal* v. *Brown*, 1 Cranch's C. C. 69.

In ejectment for mining claims in California, neither party having title, the defendant cannot set up an outstanding title in the United States government. *Coryell* v. *Cain*, 16 Cal. 567.

A mortgagor cannot set up title in a third person in an action by the mortgagee (*Roe* v. *Pegge*, 4 Dougl. 309; 1 Term R. 760; *Goodtitle* v. *Bailey*, Cowp. 601); but he may set up a prior mortgage and payment of rent to the prior mortgagee. *Doe* v. *Barton*, 11 Ad. & Ell. 307; 3 P. & D. 194; 4 Jur. 432.

In Missouri the title of a mortgagee after forfeiture is such an outstanding title as will bar a recovery in ejectment (*Meyer* v. *Campbell*,

12 Mo. 603); unless the mortgage is more than twenty years old, in which case there must be also evidence as to the possession of the mortgaged premises and the present existence of the mortgage debt (*Moreau* v. *Detchemendy*, 18 Mo. 522); but one not connected with it cannot set up such defense. *Woods* v. *Hilderbrand*, 46 Mo. 284; 2 Am. Rep. 513. In Indiana a mortgagee's estate cannot be set up as an outstanding title (*Johnson* v. *Cornett*, 29 Ind. 59); nor can it be in Connecticut (*Burr* v. *Spencer*, 26 Conn. 159); nor in Rhode Island, can a defendant who has purchased a mortgage pending the action, set up his rights under it as a defense. *Fitzpatrick* v. *Fitzpatrick*, 6 R. I. 64.

§ 5. **Inchoate rights and equities.** A mere right of action, such as a widow's right of dower before assignment, is held in Iowa to be no defense to an ejectment by the owner of the fee (*Cavender* v. *Smith*, 8 Iowa, 360); yet, in Missouri it is held that a transfer by the widow of such dower right gives the transferee a possessory right, which will defeat the action. *Jones* v. *Manly*, 58 Mo. 559.

The common-law rule excluding all defenses in ejectment, except those which are legal, prevails to a considerable extent in this country, and is still adhered to by the United States courts (*Larriviere* v. *Madegan*, 1 Dill. 455; *Singleton* v. *Touchard*, 1 Black, 342); yet, in many of the States equitable defenses are allowed by statute; and in such States any facts amounting to an equitable right or defense may be set up, and equitable relief be obtained. *Newsome* v. *Williams*, 27 Ark. 632; *Meador* v. *Parsons*, 19 Cal. 294; *Hayden* v. *Stewart*, 27 Mo. 286; *Requa* v. *Holmes*, 26 N. Y. (12 Smith) 338; *Smith* v. *Tome*, 68 Penn. St. 158; *Fisher* v. *Moolick*, 13 Wis. 321; *Prentiss* v. *Brewer*, 17 id. 635. Such a defense must, however, be strong, clear and decisive. If it is of such a character as entitles the defendant to possession, it will prevail even against the legal title (*Willis* v. *Wozencraft*, 22 Cal. 607); but if the holder of the equitable title is chargeable with laches, the legal title will prevail unless it was taken with notice of the equitable title. *Holtzapple* v. *Phillibaum*, 4 Wash. C. C. 356. In an action by an heir to recover an undivided share of his ancestor's estate, the defendant may set up as a defense, that a conveyance of land was made to the plaintiff by such ancestor, by way of advancement, which was equal or superior to the share to which he would otherwise have been entitled out of the estate. *Bell* v. *Champlain*, 64 Barb. 396.

In Minnesota a defendant may set up equities, so far as they relate to the right of possession, which would have been sufficient under the former practice to enable him to obtain an injunction against the legal owner's proceeding at law. *Williams* v. *Murphy*, 21 Minn. 534. In Iowa a defendant may now set up any matter which would authorize

a court of equity to grant relief against a legal liability, but which could not be pleaded at law; and he may, therefore, set up possession under a contract for a conveyance and readiness to perform, as a defense to a grantee of his vendor who took with notice of the contract (*Rosierz* v. *Van Dam*, 16 Iowa, 175; *Warren* v. *Crew*, 22 id. 315); and generally, in States where equitable defenses are allowed, a vendee in possession under a contract of purchase may defend an action by his vendor, or one claiming under him, by showing that he has fully performed such contract, or has so far performed that he is entitled to a deed and could compel specific performance, or that he is not in default, or any other facts showing that it would be inequitable to enforce a forfeiture. *Tibeau* v. *Tibeau*, 19 Mo. 78; *Love* v. *Watkins*, 40 Cal. 547; *Carpenter* v. *Ottley*, 2 Lans. 451; *Traphagen* v. *Traphagen*, 40 Barb. 537; *by the La Fontain*, 51 id. 186; *Cavalli* v. *Allen*, 57 N. Y. (12 Sick.) 508; *Pierce* v. *Tuttle*, 53 Barb. 155; *Richards* v. *Elwell*, 48 Penn. St. 361. Even a verbal contract partly performed will answer. *Arguello* v. *Edinger*, 10 Cal. 150; *Young* v. *Montgomery*, 28 Mo. 604.

A deed by the vendor's attorney, given after full payment to him under the contract, conveys at least an equitable title, which will be good against grantees of the vendor having notice thereof. *De Rutte* v. *Muldrow*, 16 Cal. 505.

In Virginia, a right to re-conveyance after full payment of the amount secured by a trust deed or mortgage, or to a conveyance on payment of the purchase-money and the performance of the other conditions on a sale, is held a good defense to an ejectment by the holder of the deed or mortgage, or the vendor. *Davis* v. *Teays*, 3 Gratt. 283.

But a vendee who fails to pay the purchase-money for two and one-half years after it becomes due according to his contract cannot set up such defense. *Thorne* v. *Hammond*, 46 Cal. 530. A contract of sale of pre-empted public lands, executed by a pre-emptor before he has made proof and payment as such, is void by law, and cannot be set up as a defense to an action brought by him after he has obtained a patent. *Huston* v. *Walker*, 47 Cal. 484.

A parol partition and occupation in accordance therewith is a good defense to an ejectment by one co-tenant against another to recover his undivided share of the land occupied by the latter; and, if pleaded as an equitable counterclaim, the defendant may have judgment requiring a release. *Buzzell* v. *Gallagher*, 28 Wis. 678.

An equitable estoppel may be set up as a defense; as where the purchaser at a sale on a judgment of lien in favor of materialmen takes an assignment of a like judgment in favor of contractors, in which the amount of the former judgment is included, and receives payment

in full of the latter judgment, he cannot claim under the sale (*Mariner* v. *Milwaukee & St. P. R. R. Co.*, 26 Wis. 84); or where adjoining owners settle their boundary line by agreement, and build on the land in reliance upon the settlement, they cannot claim beyond such line. *Corkhill* v. *Landers*, 44 Barb. 218.

An equitable title in the defendant, or in a third party under whom he claims, is also a good defense, wherever equitable defenses are allowed. *McClane* v. *White*, 5 Minn. 178; *Safford* v. *Hynds*, 39 Barb. 625. But in Missouri such equitable title must be prior to the plaintiff's title. *O'Brien* v. *Perry*, 1 Black, 132

The grantee of the beneficiary under a deed of trust, in possession, may set up title under such deed against the maker thereof until the debt secured thereby is paid *Johnson* v. *Houston*, 47 Mo. 227 Where land is conveyed to trustees for the benefit of a married woman, with power to convey as she, "by writing, etc., shall direct and appoint," one to whom she grants directly without the intervention of the trustee, has an equitable title under which he can defend his possession. *McFadden* v. *Drake*, 79 Penn. St. 474.

An equitable title cannot be set up in Tennessee as to lands included in Virginia grants. *Robinson* v. *Campbell*, 3 Wheat. 212.

Such a title will not avail unless specially pleaded. *Cadiz* v. *Majors*, 33 Cal. 288. Thus, where a patent was obtained under such circumstances as to make the grantee a trustee for another, the latter setting that up as a defense must set out those circumstances particularly in his pleading. *Carman* v. *Johnson*, 20 Mo. 108.

Fraud in the purchasers at a sheriff's sale, under whom the plaintiffs claim, by which they prevented competition in bidding, may be shown as a defense in ejectment. *McCaskey* v. *Graff*, 23 Penn. St. 321. Defendants may also show that a deed from their ancestor to the plaintiff, under which he claims, is void for fraud (*McCall's Lessees* v. *Carpenter*, 18 How. [U. S.] 297); or that a deed given by them to the plaintiff was in fact a mortgage to secure money advanced by him to pay for the land, and that he has fraudulently refused to perform his agreement to execute a contract of sale. *Dodge* v. *Wellman*, 43 How. 427; 1 Abb Ct. App. 512. Even the grantor of a deed given for the purpose of defrauding his creditors, he retaining the possession, may set up that fraud as a defense to an action by his grantee, both being in *pari delicto*. *Harrison* v. *Hatcher*, 44 Ga. 638. One who was induced to convey land by the false representations of the grantee that he was perfecting the title of another to whom it had been defectively conveyed, may set up that fraud against such grantee (*Levick* v.

Brotherline, 74 Penn. St. 149); but it should be set up as an equitable counter-claim. *Lombard* v. *Cowham*, 34 Wis. 486.

In an action by the grantee of the State board of escheats against an adverse claimant, the latter cannot set up a fraud upon the State in granting the conveyance, as a defense. *Crane* v. *Reeder*, 25 Mich. 303.

A mistake in the deed given to the plaintiff by the defendant may be set up as a defense to an ejectment brought within ten years after the claim accrued. *Cramer* v. *Benton*, 4 Lans. 291; 60 Barb. 216; 64 Barb. 522; 16 Sick. 638; *Hicks* v. *Sheppard*, 4 Lans. 335. That the land in controversy was intended to be conveyed to the defendant by a certain deed which misdescribes it, is a good defense, even though the defendant does not ask to have it reformed. *Hoppough* v. *Struble*, 60 N. Y. (15 Sick.) 430. Where a surveyor bought a specific lot of public land, and mislocated it in his survey, his successors in title are not estopped by his mistake from claiming the land bought. *Kaul* v. *Lawrence*, 73 Penn. St. 410.

A misapprehension of facts under which the defendant entered into an agreement to surrender land to which he had an equitable title, is a good defense to an ejectment therefor *Gough* v. *Dorsey*, 27 Wis. 119.

That the deed under which the plaintiff claims is in fact a mortgage is no defense in Missouri, unless the defendant asks to reform or to redeem. *Sutton* v. *Mason*, 38 Mo. 120.

A defendant who had made advances for the benefit of the plaintiff and of the property in controversy, and afterward bought the property under color of legal proceedings, may set up that fact by equitable plea in ejectment, with a claim to be reimbursed before a recovery is had against him. *Askew* v. *Patterson*, 53 Ga. 209.

It has been held in New York that, in ejectment by the devisee of a deceased person, the defendant may set up the equitable defense that the land was bought as partnership property, though the title was taken in the name of the deceased, and that the defendant paid his share toward the purchase and expended money for improvements, and is in possession as partner. *Thompson* v. *Egbert*, 1 Hun, 484; 3 N. Y. Sup. (T. & C.) 474. Such a defense can be set up only in equity in California. *Lowe* v. *Alexander*, 15 Cal. 296.

In Connecticut and Vermont a mortgagor sued in ejectment by the mortgagee may defeat the action by tendering the amount due, with costs, at any time before judgment. *McDaniels* v. *Reed*, 17 Vt. 674.

§ 6. **Miscellaneous.** An abandonment of possession by the plaintiff causes a loss of rights acquired by prior possession, and that defense may be shown by parol. *Onderdonk* v. *Lord*, Hill & Den.

129; *Roberts* v. *Unger*, 30 Cal. 676. An abandonment by the grantor of the plaintiff before conveyance to him is also a good defense. *Bird* v. *Lisbros*, 9 Cal. 1; *Sweetland* v. *Hill*, id. 556. But to defeat an ejectment founded upon a prior possession on that ground, the abandonment must have been without intention of resuming possession. *Hicks* v. *Steigleman*, 49 Miss. 377.

Acquiescence by the owner of land crossed by a railroad in the occupation by the company of the land taken for its road, during construction, without prepayment of damages, on an understanding or agreement for future payment, is a good defense to an ejectment by him for the land on the ground of non-payment, brought after the road is finished and operated. *McAulay* v. *Western, etc., R. R. Co.*, 33 Vt. 311.

Bankruptcy of a mortgagor is no bar to an ejectment by his mortgagee against a third person not connected with the assignee, though brought without permission of the bankruptcy court, where such assignee has never assumed possession nor intermeddled with the estate. *Eyster* v. *Gaff*, 2 Col. T. 228.

In an action against a co-tenant to recover an undivided interest in lands, where the defendant derives title from the same source as the plaintiff, but relies on his adverse possession and the statute of limitations for his defense, he cannot take advantage of defects in the acknowledgment or recording of the plaintiff's deed. *Long* v. *Stapp*, 49 Mo. 506.

A defect of title in the plaintiff as assignee in bankruptcy, by reason of irregularities in the bankruptcy proceedings, cannot be set up by a tort-feasor (*Stevens* v. *Hauser*, 39 N. Y. [12 Tiff.] 302; 7 Trans. App. 71); nor can a mere intruder question the validity of a patent, or of a deed from a municipal corporation, under which the plaintiff claims (*Holt* v. *Hemphill*, 3 Ham. 232; *Low* v. *Lewis*, 46 Cal. 549; *Read* v. *Caruthers*, 47 id. 181); yet, generally, the invalidity of the plaintiff's title is a good defense. *Fulton* v. *Hanlow*, 20 Cal. 450; *Hart* v. *Burnett*, 15 id. 530.

A defendant who claims to hold under the plaintiff by contract of purchase is estopped from disputing his title (*McClung* v. *Echols*, 5 W. Va. 204); and so is one who stands by at a sheriff's sale, and sees his own property sold to the plaintiff as the property of another, without claiming his rights. *Epley* v. *Witherow*, 7 Watts, 163; *Carr* v. *Wallace*, id. 394.

A former recovery in ejectment by paramount title against those under whom the plaintiff claims, and acquiescence under it, is a defense to a new action for the same land (*Ridgely* v. *Ogle*, 4 Harr. & McH. 123; *Jackson* v. *Rightmyre*, 16 Johns. 314); but a deed obtained by the

defendant during the pendency of a former ejectment and not litigated therein is not cut off as a defense by plaintiff's recovery in such action. *Wing* v. *Hall*, 47 Vt. 182. Even a nonsuit entered by consent, in a former ejectment suit for the same land and between the same parties, after a judgment for the defendant has been set aside and a new trial granted, is a bar to a new action therefor. *Cunningham* v. *City of Milwaukee*, 13 Wis. 120.

A homestead right in the land in controversy is a good defense, in Illinois, as to all the land to which it attaches, even though exceeding one thousand dollars in value (*Pardee* v. *Lindley*, 31 Ill. 174); and grantors may set up as a defense that their deed or mortgage does not operate as a release of such right. *Connor* v. *Nichols*, 31 Ill. 148; *Smith* v. *Miller*, id. 157.

Default in payment of the mortgage debt is a good defense to a mortgagee in possession or one claiming under him (*Harrington* v. *Fortner*, 58 Mo. 468; *Hennesy* v. *Farrell*, 20 Wis. 42; *Hubble* v. *Vaughan*, 42 Mo. 138; *Holt* v. *Rees*, 44 Ill. 30); and the title of the mortgagee may be set up, although the mortgage has been satisfied since the forfeiture. *Smith* v. *Vincent*, 15 Conn. 1. Seizin in fee under a mortgage is a good defense (*Hoxie* v. *Finney*, 11 Gray, 511); but an entry by the mortgagee and tenancy under him since the date of the writ will not avail. *Weston* v. *Spiller*, 2 Allen, 125. A debtor, who conveyed in fraud of his creditors and procured his grantee to mortgage for his benefit, cannot set up the title of the mortgagee and a lease to himself against a trustee in insolvency, in whom title is vested subject to the rights, if any, of the mortgagee, who took without notice of the pending suit in equity. *Birge* v. *Nock*, 34 Conn. 156.

In Rhode Island, a mortgagor whose equity of redemption has been sold on execution can set up as a defense against the purchaser a lease for years held by him from a prior mortgagee, and if his possession under it commenced pending the suit, he can plead it *puis darrien continuance*. *Simmons* v. *Brown*, 7 R. I. 427.

A defendant who, though not the mortgagor, yet really defends for his benefit, cannot set up a prior mortgage by him as a defense against the mortgagee. *Doe* v. *Clifton*, 4 Ad. & Ell. 813.

In ejectment on a mortgage the consideration thereof cannot be inquired into. *Doe* v. *Roll*, 7 Ham. 70.

A right reserved in a deed, to enter upon land and take off timber, is a bar to ejectment until it is determined. *Narehood* v. *Wilhelm*, 69 Penn. St. 64.

That the defendant or the person under whom he claims is a tenant in common or joint tenant with the plaintiff is a good defense, unless the plaintiff shows an ouster. *Sharp* v. *Ingraham*, 4 Hill, 116.

§ 7. **Disclaimer.** In ejectment the plaintiff's right of recovery as against the defendant depends no less upon the wrong of the defendant in withholding the possession of the land in controversy, than upon the right of the plaintiff to regain such possession. If, therefore, the defendant has been guilty of no wrong, that is a complete defense to the action, and one of which he may avail himself under the plea of the general issue. But the statutes of several of the American States have made provisions for such cases; under which the defendant may deny that he was in possession of the premises at the commencement of the action, and disclaim any right, title or interest therein, or may do so as to any part thereof particularly described by him, and by so doing may defeat the action in whole or in part. The want of such a disclaimer on the part of the defendant is by some of those statutes made equivalent to an admission of possession. *Blake* v. *Dennett*, 49 Me. 102.

The effect of such a disclaimer is usually to throw upon the plaintiff the burden of proving that the defendant entered upon the land disclaimed, and if he fails to do so as to some part of the premises, he can recover no costs, but the defendant will be entitled thereto. *Society for Propagation of the Gospel* v. *Hall*, 2 N. H. 416.

Where the declaration is for a large tract of land and the defendant is in possession of only a part, if the plaintiff shows no title to that part, no disclaimer is necessary in order to prevent a judgment against him for land not in his possession. *Hipp* v. *Forester*, 7 Jones' Law, 599.

In Pennsylvania it is held that a disclaimer is inappropriate to the action because the merits can be fully tried under the general issue. *Zeigler* v. *Fisher's Heirs*, 3 Penn. St. 365.

ARTICLE X.

JUDGMENT.

Section 1. In general. The statutes of the different States to a great extent regulate and determine the form and effect of judgments in ejectment, and parties for and against whom they may be rendered; but the general principles pervade all such statutes, and their object is the same, that is, to set at rest as speedily as possible all controversies in respect to the possession of lands, and to ascertain and determine the rights of the respective claimants, so far as may be, in a single action.

As a general rule, in ejectment by two or more plaintiffs or against two or more defendants, the judgment may be for one or more of the plaintiffs and against one or more defendants; and it may be against the defeated parties jointly or severally, according to the facts appear-

ing upon the trial. It may also be for one of the plaintiffs and against all the others In West Virginia, if the jury find in favor of part of the plaintiffs, but fail to find against the others, the latter may confess and allow judgment to be taken against them in favor of the defendants. *Strader* v. *Goff*, 6 W. Va. 257. A judgment rendered in favor of one plaintiff without objection, in a case where there was no finding as to the others, but some counts of the declaration alleged possession in him alone at the time of the ouster, and others alleged it in him and the others jointly, has been sustained by the United States supreme court. *Armstrong* v. *Morrill*, 14 Wall. 120.

In a joint action by two or more plaintiffs a failure of title in one will not, in Missouri, prevent a recovery by the others who show good title not barred; a nonsuit need not be taken in advance as to the one not entitled to recover. *Miller* v. *Bledsoe*, 61 Mo. 96. In California, if part of the plaintiffs are not shown to have any title, their names may be stricken out, and the remainder may have judgment, but it cannot be rendered in favor of all. *Tormey* v. *Pierce*, 49 Cal. 307.

In Wisconsin it is held that where the defendants stipulate that they are in possession of the premises described in the complaint, a joint judgment may be rendered against all for so much as the plaintiff shows title to. *Horner* v. *Chi., Milw. & St. P. R. R. Co.*, 38 Wis. 165.

If a joint possession by the defendants is proved, the judgment must be joint, whether they plead jointly or severally. Where a house is occupied by several persons, although they occupy different apartments, they are joint occupants, and may be proceeded against jointly (*Pearce* v. *Colden*, 8 Barb. 522); but where individual defendants are in possession of separate rooms in a dwelling-house, and of separate parcels of the land, as tenants of their co-defendant, the plaintiff must elect which he will proceed against, and verdict may be given in favor of the other defendants. *Fosgate* v. *Herkimer Manf. and H. Co.*, 9 Barb. 287; 12 id. 352, 356; 12 N. Y. (2 Kern.) 580; *Rogers* v. *Arthur*, 21 Wend. 598.

In West Virginia, if the defendants hold in severalty, the plaintiff may have judgments against each severally for the parcel held by him.

In California, the plaintiff may dismiss as to part of the defendants and proceed against the others alone (*Reed* v. *Calderwood*, 22 Cal. 463); or when several defendants file a joint answer which does not specify their respective lots and no proof is offered on that point, the verdict and judgment may be joint. *McGarvey* v. *Little*, 15 Cal. 27.

The form of a judgment for the plaintiff ordinarily is that he recover possession of the premises to which he is found entitled by the verdict of the jury or the decision of the court. It must follow the complaint in respect to the property or interest recovered. If that claims an undivided share of the premises, the plaintiff cannot recover the whole or a greater share, but as a general rule he may recover less. It should specify particularly the estate to which the plaintiff is found entitled. *Koon* v. *Nichols*, 63 Ill. 163. If a judgment in ejectment describes the land as bounded by any object, and it appears upon its record that its boundaries may be identified in the field, such judgment is not void upon its face for uncertainty. *Lawrence* v. *Davidson*, 44 Cal. 177.

Where the action is to recover dower not previously assigned, the judgment usually directs it to be assigned

In Georgia, if the lease under which the action is brought expires before judgment, the plaintiff can recover nothing without an amendment of his declaration (*Roe* v. *Adams*, 30 Ga. 608); but generally if the estate claimed by the plaintiff expires after the commencement of the action but before judgment, he can recover damages for the withholding of the property. *Van Rensselaer* v. *Owen*, 33 How. Pr. 12; 48 Barb. 60; *Gordon* v. *Overton*, 8 Yerg. 121. A mere transfer of the plaintiff's title to another pending the suit, will not, however, prevent a recovery by his assignee.

If the plaintiff's title is subject to an easement, such as one for the support of a party-wall, the judgment will give him possession subject to such easement, and it should define the nature and extent of his interest. *Rogers* v. *Sinsheimer*, 50 N. Y. (5 Sick.) 646. If the judgment be against a married woman for land in which she has a homestead right, the judgment should be qualified and subject to that right.

Sometimes the judgment will impose conditions. Thus, where a will gives to the testator's daughter a legacy out of a specific fund, with remainder to her children, and she sues to recover land in which the testator invested part of that fund in his life-time, the judgment may require her to release the executor from that portion of the legacy, leaving it as a charge on the land in favor of her children. *Hauberger* v. *Root*, 5 Penn. St 108. And where the defendant claims for improvements, the plaintiff may, in some of the States, be required to elect to take a judgment for the land subject to paying for the improvements, or judgment for the value of the land independent of the improvements. *Rawson* v. *Parsons*, 6 Mich. 401.

In Rhode Island a judgment in ejectment on a mortgage for condition broken by non-payment of interest, should be conditioned

upon the failure of the mortgagor to redeem. *Carpenter* v. *Carpenter* 6 R. I. 542.

If the plaintiff fails to establish his right to the possession, the defendant is of course entitled to judgment. Usually this judgment goes no farther than a denial of the plaintiff's right, and a recovery of costs. The United States supreme court holds that it should be simply, that the plaintiff hath no title *Litchfield* v. *R. R. Co.*, 7 Wall. 270.

In some of the States, however, affirmative relief will be given to the defendant; and there, if the plaintiff has the title and the defendant is entitled to it, the judgment may require the plaintiff to convey to him on receiving payment for his improvements (*Gough* v. *Dorsey*, 27 Wis. 119); or if he is entitled to the specific performance of a contract, he may have judgment for a deed on payment of the purchase-money (*Hotaling* v. *Hotaling*, 47 Barb. 163); or if he is entitled to redeem, the judgment may be that he may do so within a specified time, on payment of the amount due and interest. *Fisk* v. *Brunette*, 30 Wis. 102.

But the courts will not grant affirmative relief, such as correcting a mistake or declaring void a tax deed, if the rights of one not a party will be affected. *Cramer* v. *Benton*, 4 Lans. 291; 60 Barb. 216; *Cull* v. *Chase*, 21 Wis. 511.

§ 2. **What may be recovered.** Having in article 2 of this title stated particularly for what kinds of property, or what estate or interest therein, ejectment will lie, it is hardly necessary to say here that any such property, estate or interest to which the plaintiff shows himself entitled, may be recovered in the action. As we have already said, the judgment must follow the complaint, and where that states, as it should, the estate or interest claimed by the plaintiff, he cannot recover a different estate or interest. *Winstanley* v. *Meacham*, 58 Ill. 97.

By the judgment the plaintiff obtains possession of the lands recovered, but does not acquire any new title thereto. He is in simply of the title which he had before. If that was a freehold, he is in as a freeholder; if it was a chattel interest, he is in as a termor; and if he has no title at all, he is in, so far as the real owner is concerned, as a trespasser and liable to the latter as such. If the recovery is of a term, it should be only for the unexpired portion of the term laid in the demise. *Kennedy* v. *Reynolds*, 27 Ala. 364.

The judgment should also follow the verdict, and be entered up for only that land which the defendant is found guilty of withholding

If that be the whole premises claimed, the plaintiff is of course entitled to recover the whole.

In several States it has been held that, where the plaintiff claims the whole of certain premises and is found entitled to only a part or an undivided interest, he cannot recover (*Allie* v. *Schmitz*, 17 Wis. 169; *Bresee* v. *Stiles*, 22 id. 120; *Murphy* v. *Orr*, 32 Ill. 489; *Ballance* v. *Rankin*, 12 id. 420); but the rule which generally prevails undoubtedly is, that he may recover for so much as he shows to be wrongfully detained from him by the defendant (*Doe* v. *Lewis*, 13 M. & W. 241; *Doe* v. *King*, 6 Exch. 791; 20 L. J. Exch. 301; *Chapin* v. *Scott*, 1 Chip. 41; *Treon* v. *Emerick*, 6 Ham. 391; *Todd* v. *McGee*, 2 Bibb, 350; *Van Alstyne* v. *Spraker*, 13 Wend. 578; *Scott* v. *Bealle*, 1 A. K. Marsh. 69; *Magruder* v. *Peter*, 4 Gill & J. 323; *Hayes* v. *Martin*, 45 Cal. 559); and if that be only an undivided interest, he may have judgment for that interest. *Harrison* v. *Stevens*, 12 Wend. 170; *Carroll* v. *Norwood*, 5 Harr. & J. 155; *Moore* v. *Abernathy*, 7 Blackf. 442; *Gray* v. *Givens*, 26 Mo. 291; *Jones* v. *Walker*, 47 Ala. 175; *Squires* v. *Riggs*, 2 Hayw. 150.

If the defendant does not allege that he is a tenant in common, coparcener or joint tenant with the plaintiff, but defends for the whole, the plaintiff may recover whatever part he shows himself entitled to. *Doe* v. *Prosser*, Cowp. 218; *Brown* v. *Combs*, 29 N. J. L. 36.

When less than the whole is recovered, the extent of the recovery should be particularly specified. *Callis* v. *Kemp*, 11 Gratt. 78.

A tenant in common may recover the whole common property from a stranger, notwithstanding such stranger may have acquired the rights of the other tenants in common by adverse possession (*Chipman* v. *Hastings*, 50 Cal. 310); but he cannot ordinarily recover the whole from his co-tenant. *Clark* v. *Huber*, 20 Cal. 196. The contrary is held, however, in Pennsylvania. *Mobley* v. *Bruner*, 59 Penn. St. 481.

If the plaintiffs collectively are entitled to the whole of the premises, then the verdict and judgment should be general, for the whole, but if for only a part, then for that part. *Wood* v. *Staniels*, 3 Code, 152.

If the action be for several tracts of land, stated in separate counts, the judgment should be for such tracts as the proof shows the plaintiff entitled to; or if the verdict is general, judgment may be rendered on the count proved, and a *nolle prosequi* be entered as to the other counts. *Fite* v. *Doe*, 1 Blackf. 127.

In many of the States it is provided by statute, that the plaintiff may in the same action recover not only the possession, but also damages for withholding rent and profits (*Sullivan* v. *Davis*, 4 Cal. 291); but this part of our subject belongs to and will be considered in our next

article. It is held in Wisconsin, that the plaintiff cannot, in the action of ejectment, recover damages for waste or other injuries to the property. *Pacquette* v. *Pickens*, 19 Wis. 219.

§ 3. **Effect of judgment.** A final judgment in ejectment, like those in other actions, is conclusive of the questions litigated and decided in the action. As a general rule, if the title in fee simple to the premises in controversy be put in issue and tried, the judgment will conclude the parties to the action and their privies from ever again litigating the same title or rights. *Amesti* v. *Castro*, 49 Cal. 325; *Sturdy* v. *Jackaway*, 4 Wall. 174. It does not have the effect to transfer the title of the losing party, but if presented in the proper mode, it shuts out proof of such title when drawn in issue. Its effect bears a closer resemblance to an extinguishment, than to a transfer of the adverse title. It awards the possession to the prevailing party, because he had title at the commencement of the action, and because the losing party had no title, or not such title as would authorize him to withhold the possession. *Mahoney* v. *Middleton*, 41 Cal. 41.

In Vermont the object of the action is, not merely to recover the possession of the land, but to settle the title and establish the right of property, and the judgment is, therefore, held conclusive upon all parties, as to the title as well as the possession. *Marvin* v. *Dennison*, 1 Blatchf. 159; *Edwards* v. *Roys*, 18 Vt. 473. But generally the title is not in issue, and the judgment is conclusive only as to matters actually put in issue and determined. *Hammond's Lessee* v. *Inloes*, 4 Md. 138; *Smith* v. *Sherwood*, 4 Conn. 276; *Bradford* v. *Bradford*, 5 id. 127; *Troutman* v. *Vernon*, 1 Bush, 482; *Marshall* v. *Shafter*, 32 Cal. 176.

So far as the title is put in issue and established on the trial, the judgment is conclusive, but it is only the title then existing which is concluded, and the judgment has no effect upon a title subsequently acquired (*State Bank* v. *Bridges*, 11 Rich. 87; *Mann* v. *Rogers*, 35 Cal. 316); and it is no bar to another suit, or to defenses set up in a subsequent suit, unless the titles and defenses in both are precisely alike. *Foster* v. *Evans*, 51 Mo. 39. For the purpose of applying this rule, the party may show by parol what title was established in the action. *Briggs* v. *Wells*, 12 Barb. 567.

Although it may not be conclusive as to title, yet it is conclusive evidence of the right of possession of the party recovering, at the time of the recovery. *Clarkson* v. *Stanchfield*, 57 Mo. 573.

A judgment in ejectment is conclusive of the boundary line between the parties thereby established, and it cannot be contested in a subsequent suit for trespass on the land between the grantee of the plaintiff and the defendant or his privy. *Beebe* v. *Elliott*, 4 Barb. 457.

In Illinois, if a question of fraud is decided in ejectment, the decision is conclusive in a subsequent suit in equity. *Blanchard* v. *Brown*, 3 Wall. 245.

In Pennsylvania, a judgment in ejectment to enforce or rescind a contract is conclusive of the rights of the parties under the contract (*Aurick* v. *Oyler*, 25 Penn. St. 506); and a judgment regularly entered and docketed on an equitable title is conclusive, when that title is directly in issue and decided upon. *Meyers* v. *Hill*, 46 Penn. St. 9. Such a judgment is as conclusive as would be the decree of a chancellor. *Treftz* v. *Pitts*, 74 Penn. St. 343.

In New Jersey the judgment is conclusive of the plaintiff's right of possession and of his title to mesne profits subsequently accruing (*Den* v. *McShane*, 13 N. J. Law, 35); but in Missouri a recovery of a mere nominal sum for damages is a bar to a recovery in a subsequent action for rents accruing prior to the judgment. *Stewart* v. *Dent*, 24 Mo. 111. In Texas, a judgment in trespass does not decide the title, though conclusive in a subsequent action for rents; but the plaintiff may maintain a second suit for the adjudication of his title. In Delaware a judgment in ejectment is not conclusive in any other ejectment, even though rendered by confession (*Hawkins' Lessee* v. *Hayes*, 3 Harr. 489); but an award upon a reference in such action is conclusive, and estops the plaintiff from bringing another action. *Porter's Lessee* v. *Matthews*, 2 id. 30.

A judgment in favor of the landlord in an action against his tenant holding over, does not determine the question of title as between such landlord and a person whom the tenant has collusively put in possession pending the suit. *Calderwood* v. *Brooks*, 45 Cal. 519.

A judgment in favor of the defendant ought to be, and is, as conclusive as one for the plaintiff. *Doyle* v. *Franklin*, 40 Cal. 106.

In many of the States provision is made by statute for the allowance of one or more new trials in ejectment, upon application of the defeated party, without special cause shown. How many such new trials may be had depends upon the statutes by which they are allowed. In Minnesota, and presumably elsewhere, the judgment upon the second or last trial so allowed will be final as a bar to another action, yet it may be reviewed for errors. *Baze* v. *Arper*, 6 Minn. 220.

The general rule, that a judgment concludes all parties to the suit and their privies is applicable to judgments in ejectment as well as others. By parties in ejectment are meant, all persons having a right to control the proceedings, make a defense, or appeal from the judgment. *Boles* v. *Smith*, 5 Sneed, 105. Thus, a landlord who is made a defendant in an action brought against his tenant, is generally held con-

cluded by the judgment; but he is not so if not made a party (*Smith* v. *Towle*, 22 Wis. 655); nor if the judgment is obtained by collusion between the plaintiff and the tenant. *Stridde* v. *Saroni*, 21 id. 173; *Rider* v. *Alexander*, 1 Chip. 267; *Wharton* v. *Botham*, 3 Watts & S. 158. It is held in Georgia, however, that if the suit is against one who is in fact a tenant, the landlord is bound if he knows of the suit, though not made a formal party, and may be turned out by writ of possession if he has resumed it. *Rodgers* v. *Bell*, 53 Ga. 94.

In Wisconsin it is held that a grantor with covenants of warranty is not concluded by a judgment in ejectment against his grantee, although notified to defend, if after an adverse judgment he is not allowed to take the necessary steps for a new trial. *Eaton* v. *Lyman*, 26 Wis. 61.

A judgment by default against the vendee in possession under an executory contract of purchase has, in several cases, been held not conclusive on the rights of his vendor, even though he had notice of the pendency of the action. *Cadwallader* v. *Harris*, 76 Ill. 370. In Delaware it is held that a judgment by default in a former action legally establishes the right of possession as between the parties in a subsequent action, but unless followed by entry it does not affect the defendant's rights founded on twenty years' actual and uninterrupted adverse possession. *Doe* v. *Stevens*, 1 Houst. 240.

Privies who are concluded by a judgment in ejectment are those who enter upon or acquire an interest in the premises from, through or under the defendant, or by collusion with him and without title, subsequent to the commencement of the action. *Satterlee* v. *Bliss*, 36 Cal. 489. All such persons are concluded, unless under some disability recognized by the statutes. *Ainslie* v. *Mayor, etc., of New York*, 1 Barb. 168. Our definition includes the heirs and legal representatives, as well as the assigns of a party. Purchasers from a party pending the suit, and tenants who come in under other tenants on whom notice has been served, are concluded as privies. *Walden* v. *Bodley*, 9 How. (U. S.) 34; *Jones* v. *Chiles*, 2 Dana, 25; *Smith* v. *Trabue*, 1 McLean, 87. But a judgment for possession, against one who has a mere naked title but not the possession, does not affect a person having possession and title, who is not a party. *Kansas, etc., R. R. Co.* v. *McBratney*, 12 Kan. 9. Nor is a defendant who acquires a title *pendente lite*, but does not ask and is not granted leave to set it up, concluded by a judgment for the plaintiff, as to such title. *McLane* v. *Bovee*, 35 Wis. 27.

In New York, a judgment by default does not become conclusive, until the lapse of three years from the time of docketing; but from that time it is as much a bar as if rendered after a trial. *Sheridan* v. *Andrews*, 49 N. Y. (4 Sick.) 478.

ARTICLE XI.

MESNE PROFITS; IMPROVEMENTS.

Section 1. In general. In the preceding pages we have dwelt specially and almost entirely upon the primary object of the action of ejectment. But, as has incidentally appeared, that action has a secondary object, dependent upon the success of the plaintiff in attaining the first, but no less essential to the completeness of his remedy for the wrong suffered. That is, the recovery of damages for the wrongful withholding by defendant of the possession of his land. This was, indeed, the primary object of the action from which ejectment derived its origin; but when, in the course of time, that became so changed that the proceedings were altogether fictitious, and the plaintiff merely nominal, the damages directly recoverable in the action became nominal also, and the plaintiff was compelled to resort to a subsequent or ancillary action for complete relief. Adams on Eject. 379.

The damages recoverable for that wrong were the mesne profits, that is, the profits of the land accruing during the wrongful holding of the defendant; and the action for their recovery was usually termed an action for mesne profits. But the remedy for the recovery of such profits, like that for the recovery of the land itself, has been modified and regulated by statutes, which prescribe and limit the cases in which and the mode by which they may be recovered, as well as the amount recoverable. The object professedly sought by such statutes being the attainment of complete justice between the parties, provision has been made in many of them for an allowance to the defendant for permanent improvements, or, as they are sometimes termed, betterments, made by him upon the premises in controversy. This allowance is usually made by way of set-off, in reduction of the amount of damages assessed in favor of the plaintiff, and hence will be considered in connection with that branch of our subject.

§ 2. **When recoverable.** Whatever may be the mode provided for the assessment and recovery of mesne profits, the one thing essential to the plaintiff's success is, that he shall recover possession of the premises claimed, or some part of them; and, as a general rule, the right to the mesne profits follows such recovery. *Burton* v. *Austin*, 4 Vt. 105; *Smith* v. *Benson*, 9 id. 138; *Benson* v. *Matsdorf*, 2 Johns 369.

Even a recovery in ejectment against the casual ejector, by default, has been held sufficient to maintain a subsequent action for mesne profits against the tenant in possession (*Brown's Lessee* v. *Galloway*, 1 Peters' C. C. 291); but it has been held that in such a case the plaintiff must

prove that the defendant has had actual possession of the premises or some part thereof. *Stewart* v. *Camden & Amb. R. R. Co.*, 33 N. J. L. 115.

An actual occupation of the premises by the defendant himself during the period for which damages are claimed is not usually held necessary, but it is sufficient if he was connected with the person in possession as landlord, and adopted his acts, or was interested in and derived benefit from the premises during that period. *Hunter* v. *Britts*, 3 Camp. N. P. 455; *Doe* v. *Harlon*, 12 Ad. & Ell. 40. But proof of actual possession by the defendant is always sufficient to charge him; for any person found in possession after a recovery in ejectment is liable to the action, and it is no defense for him to say that he was there as the agent and under the license of the ejectment defendant, because no man can license another to do an illegal act. The measure of damages, however, in a case of that description, will not be the whole mesne profits of the lands, but will depend upon the time the defendant has occupied them, and all the other peculiar circumstances of the case. Adams on Eject. 384.

Even though the defendant is restored to the possession, after judgment against him, by an order quashing the *habere facias* and awarding a writ of restitution, that does not relieve him from liability to an action for mesne profits, if the latter writ is itself afterward quashed. *Trabue* v. *Keller*, 3 A. K. Marsh. 517.

The action of ejectment and that for mesne profits are considered as so far separate, that a recovery of nominal damages in the former is no bar to a subsequent action for such profits. *Van Alen* v. *Rogers*, 1 Johns. Cas. 281. See *Jackson* v. *Wood*, 24 Wend. 443; *Grout* v. *Cooper*, 9 Hun, 326.

A person who takes an assignment from a mortgagor is liable to the mortgagee for mesne profits, from the time he receives notice to quit, or, in the absence of such notice, from the service of the writ (*Lyman* v. *Mower*, 6 Vt. 345); and one who takes a lease from the mortgagor subsequent to the mortgage is also liable to the mortgagee for mesne profits accruing after such notice. *Bank of Washington* v. *Hupp*, 10 Gratt. 23.

A tenant in common who has ousted his co-tenants is liable to them for mesne profits. *Camp* v. *Homesley*, 11 Ired. 211.

If, during the pendency of an ejectment, the defendant gives up the possession to a third person, and the plaintiff afterward recovers judgment, such third person is liable to him for the mesne profits, and his judgment in ejectment is conclusive evidence of the plaintiff's right thereto. *Jackson* v. *Stone*, 13 Johns. 447. See *Samson* v. *Rose*, 65

N. Y. (20 Sick.) 411. And yet, if a third person enters pending the ejectment, that does not relieve the original defendant from liability for mesne profits, unless he can show that the plaintiff received the rents and profits. *West* v. *Hughes*, 1 Harr. & J. 574.

A person who enters under a contract for a deed, and afterward refuses to perform on his part, is liable for mesne profits (*Smith* v. *Stewart*, 6 Johns. 46); and so is a tenant who holds over after the expiration of his term.

One who is landlord in fact to the defendant and has been in possession by his tenants, or has received the rents and profits, and has by his acts, commands or co-operation aided in the expulsion of the plaintiff and the withholding of the possession, or in the defense of the ejectment suit, is also liable for mesne profits. *Chirac* v. *Reinecker*, 11 Wheat. 280.

An incorporated town, on recovering by ejectment an easement which is a real franchise, holden by the town for the benefit of its cit izens, is entitled also to recover mesne profits during the occupancy of the defendant. *City of Apalachicola* v. *Apalachicola Land Co.*, 9 Fla. 340.

§ 3. **When not recoverable.** The right of parties who have recovered the possession of real property by ejectment to recover for mesne profits also, is, as we have seen, almost universal, and the cases in which they cannot do so may be regarded as simply exceptions to or limitations of a general rule. These depend upon the defendant's non-enjoyment of the premises, or non-receipt of the rents, or upon his good faith, or want of notice of the plaintiff's rights.

It has been held in Pennsylvania, that a defendant who quits the premises in controversy pending the ejectment suit is not liable for mesne profits afterward accruing (*Mitchell* v. *Freedley*, 10 Penn. St. 198); and in Colorado, that if the defendant has a clear and connected title of record, and had no actual notice of an adverse title also of record, he is not liable for rents and profits prior to notice of the plaintiff's claim; and in Vermont, that in a suit against the mortgagor and mortgagee, the former is not answerable for rents not received by him. In California it is held that, if in the ejectment suit there is no finding of the value of the use and occupation of the premises, the plaintiff is not entitled to judgment for damages by way of mesne profits. *Camarillo* v. *Fenlon*, 49 Cal. 205.

The legal right of action for mesne profits which accrued pending an ejectment is lost by the death of the defendant after judgment in that action, and his executors or administrators are not liable; but the death of the plaintiff after judgment merely has the effect to transfer the right

of recovery to his heirs. *Means* v. *Presb. Church*, 3 Penn St. 93; *Harker* v. *Whitaker*, 5 Watts, 474; *Bard* v. *Nevin*, 9 id. 328 *Pulteney* v. *Warren*, 6 Ves. Jr. 73.

§ 4. **In what action.** In several of the American States the plaintiff's claim for mesne profits is considered and treated as a part of his original cause of action, and he may declare for and recover them in the ejectment suit, as damages for withholding the premises. *Walker* v. *Mitchell*, 18 B. Monr. 541. In some the remedy for their recovery is by a suggestion upon the record after judgment in the ejectment suit, and a trial of the issues raised thereon, and in others still the plaintiff may elect to recover them in the ejectment suit, or to bring another action for that special purpose, after recovery in ejectment. *Battin* v. *Bigelow*, 1 Peters' C. C. 452; *Holmes* v. *Holmes*, 19 N. Y. 488. But in England, and generally in this country, the remedy is by such a special action. It makes but little difference, however, with our treatment of the subject, which of these several modes of proceeding is the one provided by statute, as the rules governing them all are substantially alike; and the decisions relating to the action for mesne profits are almost equally applicable to the other remedies for its recovery.

As to the parties by whom, or in whose name the action may be brought, it is held generally, where the fictitious character of the action still prevails, that the action may be brought by the lessor of the plaintiff in the ejectment suit, either in his own name or in the name of his nominal lessee, it being in either shape his own action (*Gulliver* v. *Drinkwater*, 2 Term R. 261; *Doe* v. *Davies*, 1 Esp. 358; *Aslin* v. *Parkin*, 2 Burr. 665); but the former practice is to be preferred, as, if brought in the name of the nominal lessee, the damages recoverable are limited to the time since the demise laid in the declaration in the ejectment suit (*Denn* v. *Chubb*, Coxe, 466; *Van Alen* v. *Rogers*, 1 Johns. Cas. 281); and the proceedings are liable to be stayed until security for costs be filed. *Jackson* v. *Peer*, 4 Cow. 147. In Kentucky such suit must be brought in the name of the person really interested, and not in the name of the fictitious plaintiff in ejectment. *Masterson* v. *Hagan*, 17 B. Monr. 325.

If the interest of the ejectment plaintiff in the mesne profits has passed to an assignee, devisee, or personal representative, the latter is the real party in interest, and he may maintain the action either in his own name or in the name of the former plaintiff. After the death of the plaintiff, and judgment in favor of his legal representatives in the ejectment suit, the title to mesne profits inures to the benefit of all persons entitled from the institution of the action. *Karns* v. *Tanner*, 74 Penn. St. 339.

Several lessors of the plaintiff in the ejectment suit, after a recovery therein, may have a joint action for the mesne profits, although there were only separate demises by each. *Chamier* v. *Clingor*, 5 M. & S. 64; 2 Chitty, 410; *Holdfast* v. *Shepard*, 9 Ired. 222. Tenants in common who have recovered land in ejectment against a co-tenant may join in an action for the mesne profits. *Camp* v. *Homesley*, 11 Ired. 211; *Langendyck* v. *Burhans*, 11 Johns. 461; *Goodtitle* v. *Tombs*, 3 Wils. 118; *Cutting* v. *Derby*, 2 W. Bl. 1077. In Georgia it is held that there cannot be a joint recovery for mesne profits, in an ejectment suit against defendants who hold severally and not jointly, and as there can be no separate action for them in that State, it has been questioned whether the damages may not be apportioned against such defendants according to their respective holdings. *Cunningham* v. *Bradley*, 26 Ga. 238.

It has been held in Maryland that the action for mesne profits may be maintained, even pending a writ of error on the judgment in ejectment, but execution will be stayed until after the decision on such writ. *Mitchell* v. *Mitchell*, 1 Md. 59.

§ 5. **Amount of recovery.** The general rule is, that the plaintiff in an action for mesne profits is entitled to recover the annual value of the premises wrongfully withheld, from the time his title, or the title laid in his declaration accrued; not exceeding, however, the number of years limited by statute. These damages are recoverable up to the time of the trial, provided the defendant remained in possession up to that time. *Pendergast* v. *McCaslin*, 2 Ind. 87; *New Orleans* v. *Gaines*, 15 Wall. 624; *Mitchell* v. *Freedley*, 10 Penn. St. 198.

But for the statutes of limitations applicable to this action, the defendant would be liable for the mesne profits of the whole period of his occupation; but those statutes usually allow a recovery for no more than six years preceding the commencement of the action, and bar all claims of an earlier date. *Hill* v. *Meyers*, 46 Penn. St. 15; *Blodgett* v. *Hitt*, 29 Wis. 169. Where the recovery is sought by filing a suggestion after judgment in ejectment, the plaintiff can recover for only six years preceding the filing of such suggestion. *Budd* v. *Walker*, 9 Barb. 493.

The time limited is not uniform in all the States, nor does it in all of them apply when a set-off for improvements is allowed to the defendant.

In estimating the value of the use of the premises in controversy, the value of the use of improvements made by the defendant is to be excluded. *Davis* v. *Louk*, 30 Wis. 308.

Where the ouster or dispossession took place during the minority of

the plaintiff, he may subsequently recover the rents and profits which accrued during his minority. *McCrubb* v. *Bray*, 36 Wis. 333.

The right of recovery is subject to other limitations than those of the statute, growing out of the actual interest of the plaintiff, the relations of the parties, or the length or character of the possession. The plaintiff should not be allowed to recover, nor the other party be required to pay more than the actual damage suffered. *Bullock* v. *Wilson*, 3 Porter, 382. Where the plaintiff is a lessee, or the representative of a lessee of an unexpired term, he cannot recover the full value of the use as if he was owner, but only the value of his lease during the dispossession, especially where the defendant is the owner and lessor. *Holmes* v. *Davis*, 19 N. Y. 488. In an action for mesne profits of a ferry landing in Georgia, the receipts of the ferry deducting expenses were held to be the amount recoverable. *Averett* v. *Brady*, 20 Ga. 523.

If the plaintiff was a tenant in common of the premises with one not a party to the suit, he can recover only a part of the mesne profits, proportionate to his interest in the premises (*Clark* v. *Huber*, 20 Cal. 196); and, if a tenant in common with the defendant, he can recover only such as accrued since the commencement of his suit, unless he proves an ouster. *Miller* v. *Myers*, 46 Cal. 535.

In an action by devisees, their recovery is limited to the time when their title accrued. All claims for rents and profits prior to the testator's death, and for damage to the property, go to his personal representatives. *Hotchkiss* v. *Auburn & Roch. R. R. Co.*, 36 Barb. 600.

The plaintiff can recover only for such time as he proves the defendant to have been in possession. *Hare* v. *Fury*, 3 Yeates, 13. If, upon the death of a defendant pending the suit in ejectment, his heirs are substituted as defendants, their liability for mesne profits is limited to the rents and profits of their own possession after his death. *Cavender* v. *Smith*, 8 Iowa, 360.

In Alabama, one who is in possession under a lease from a third party is held not liable beyond the rent in arrear at the commencement of the suit and that subsequently accruing; and one who holds in good faith under color of title is liable only for the rents and profits for one year prior to the commencement of the suit, and is entitled to an allowance for improvements. In Missouri, the plaintiff can recover mesne profits only from the commencement of the action, unless it is shown that the defendant had knowledge of his claim prior to that, and only for the time he had such knowledge, if less than five years, and at most for five years only. In a case in Pennsylvania, where, after a judgment for the plaintiff had been reversed, the defendant

disclaimed as to a part and the plaintiff recovered judgment for that part only, it was held that he could recover mesne profits for the part recovered from the service of the writ to the rendition of the judgment, if the defendant remained in possession to that time. *Lane* v. *Harrold*, 72 Penn. St. 267. In Indiana, the defendant in an action for mesne profits may prevent a recovery of profits that accrued before service of the declaration in ejectment, by showing that he had not occupied the premises before such service. *Vance* v. *Inhabitants of Cong. Township*, 7 Blackf. 241.

In a case in Vermont against two defendants, which was delayed by injunction, it was held that the plaintiff might recover the amount of rents and profits against both defendants, although one of them was merely a tenant of the other, and continued in possession but a short time after the commencement of the suit. *Lamson* v. *Sutherland*, 13 Vt. 309.

The plaintiff may usually recover, in addition to the value of the use of the premises, the cost of the previous action of ejectment (*Pearse* v. *Coaker*, 38 L. J. Exch. 82; L. R., 4 Exch. 92; 20 L. T. [N. S.] 82); and in some cases further damages for his trouble have been allowed. *Goodtitle* v. *Tombs*, 3 Wils. 118. In some of the States the plaintiff may, in the same action, recover for waste and other damages to the property. *Huston* v. *Wickersham*, 2 Watts & S. 308. But this rule does not generally prevail.

At common law, the plaintiff, on recovering his land, took it with all improvements, and without being subjected to the condition of paying for them. They were considered as annexed to the freehold, and the defendant, being in contemplation of law a trespasser, was held to have made them at his own risk.

This rule has been so far modified that the defendant may now, under certain conditions, be allowed for such improvements in reduction of the rents and profits recoverable by the plaintiff. To entitle him to such allowance it is usually held essential that he shall have held under color of title, and have made such improvements in good faith, and that they be permanent and valuable to the inheritance. *Lunquest* v. *Ten Eyck*, 40 Iowa, 213; *Carpentier* v. *Small*, 35 Cal. 346; *Whitney* v. *Richardson*, 31 Vt. 300; *Roe* v. *Malcom*, 39 Ga. 328; *Learned* v. *Corley*, 43 Miss. 687; *Lee* v. *Bowman*, 55 Mo. 400; *Shroyer* v. *Nickell*, id. 264; *Ringhouse* v. *Keener*, 63 Ill. 230. If the defendant's possession is under color of title, the improvements will be presumed to have been made in good faith, until the contrary is proved; and an assessment for street improvements paid by him may be allowed for as such an improvement. *Stark* v. *Starr*, 1 Sawyer, 15.

One who holds under a contract of sale from a person claiming title by deed has color of title, and can be allowed for improvements. *Krause* v. *Means*, 12 Kan. 335.

Where the plaintiff and the defendant owned a leasehold interest in different parts of the same lot, and made improvements thereon, it was held that the allowance should be apportioned according to the proportional rental value of their respective parts. *Woodhull* v. *Rosenthal*, 61 N. Y. (16 Sick.) 382.

A defendant who claimed title in good faith to the premises may set off not only his own improvements but those made by persons under whom he claims with warranty, in so far as they exceed the rents for which his warrantors were liable, and may be allowed their true value to the land, and not merely their cost. *Willingham* v. *Long*, 47 Ga. 540. On recovery by a married woman of land which had been sold for her husband's debts, the defendant can be allowed only what the improvements cost. *Hall* v. *Brummal*, 7 Bush, 43.

In Indiana the value of the improvements must be assessed in the ejectment suit, otherwise the defendant cannot plead that they equal the rents and profits. *Chesround* v. *Cunningham*, 3 Blackf. 82.

In Virginia the defendant may have judgment for the balance if the value of his improvements exceeds the rents and profits; and in several States the plaintiff may, in case of such excess, elect either to pay the excess and take the land, or demand the value of the land, not including the improvements, from the defendant, tendering him a deed.

In Wisconsin the claim for improvements must be made and tried before the judgment in the ejectment suit, and the judgment in favor of the plaintiff should award him the possession on condition of his paying the amount assessed for such improvements within the statutory time, and barrring his right in case of his default in such payment. *Scott* v. *Reese*, 38 Wis. 636.

CHAPTER LXI.

EQUITY.

TITLE I.

GENERAL PRINCIPLES RELATING TO EQUITY.

ARTICLE I.

EQUITABLE JURISDICTION.

Section 1. Its general nature and extent. Equity may be defined natural right or justice, as addressed to the conscience, independently of express or positive law; a system of jurisprudence, the object of which is to render the administration of justice more complete, either by the application of rules to cases not provided for by positive law, by mitigating the rigor of the law through a liberal and rational interpretation of its principles, or by adapting remedies more exactly to the exigencies of particular cases. Burrill's Law Dict., tit. Equity.

There are many duties or obligations which cannot be enforced judicially. Equity, technically speaking, is, therefore, only a portion of natural justice in the larger sense. Neither does equity jurisprudence represent the whole of equity capable of being enforced; but only such as, being of judicial cognizance, is not enforced in the courts of common law. What mainly gave rise to equity jurisprudence was the inadequacy of the common-law procedure to do full and complete justice in all cases.

The chief basis of equity jurisdiction is the maxim that there can be no infringement of legal rights, of a civil nature, of which municipal law can take cognizance, without a remedy. Vol. 1, 4, 134. To this maxim is owing the vast system of uses and trusts which constitutes the larger portion of exclusive equity jurisdiction. At common law the creation of uses and trusts of land was regarded as void. The *cestui que trust*, being deemed to have neither *jus in re* nor *jus ad rem*, could not avail himself of any form of action, either as regarded the land or the profits. 1 Spence's Eq. 442; Sanders on Uses, 20.

At common law, if a bond was once forfeited by non-payment of principal and interest on the day stipulated, the whole penalty must have been paid; and the only remedy for the obligor, who had allowed the time of payment to elapse, was to file a bill in equity offering payment of principal and interest. The ground of relief in such case was, that equity regarded the spirit, not the letter; that the bond was intended as a security merely, and that the precise day of payment was immaterial. This equity jurisdiction still remains, though the necessity for its exercise has to a great extent passed away, from the fact that courts of law now afford the same redress.

A further illustration of the power of courts of equity to control the rules of the common law is the relief afforded by permitting the redemption of mortgaged lands after the day stipulated in the contract. The common-law courts, construing the condition in the mortgage with the utmost strictness, held that unless the money were paid on the very day, the estate was forfeited. But the courts of equity, looking to the spirit of the transaction, determined that the land was to be regarded as a pledge merely; that time was not of the essence of the contract; and that the mortgagor, after the time fixed, might pay the principal and interest then due, and receive back his estate. See *Seton* v. *Slade*, 7 Ves. 273; *Lennon* v. *Napper*, 2 Sch. & Lefr. 684; *Baugher* v. *Merryman*, 32 Md. 186; *French* v. *Burns*, 35 Conn. 359.

The not permitting a security to be enforced according to its tenor when there was a collateral agreement regulating the amount to be recovered, but not noticed in the security, and which could not be adverted to at law, was a head of relief which the court of chancery entertained from the earliest times. And the same may be said of the relief afforded in equity against deeds drawn up by mistake, contrary to the intention of one of the parties; courts of law acting on the principle that implicit credit must be given to the seal of the party unless there is proof of fraud; though the latter courts can enable a person to recover, by action, money paid by mistake; and they will not give effect to a writing in the form of an agreement, which is proved not to have had the assent of one of the parties. 1 Spence's Eq. 632, 634, 637.

The construction of deeds and wills conveying legal interests may be the subject of equity jurisdiction. The construction of such written instruments as are used for the transfer of equitable interests, or to create equitable obligations, is necessarily restricted to courts of equity.

An important instance of equity jurisdiction is the interference of the court in behalf of sureties against the creditor. The surety, on paying the debt, is entitled, on grounds of general equity, to every

advantage which the principal would have had, and to the benefit of such of the creditors' securities as have not been discharged. *Hodgson* v. *Shaw*, 3 Mylne & Keene, 183; Vol. 1, 302. The surety may apply to a court of equity to compel the principal debtor to pay the obligation, and may make the creditor a party, and avail himself of the creditor's remedies. *Dempsey* v. *Bush*, 18 Ohio St. 376. The peculiar rights of a surety originated in and are exclusively the growth of equity. But the liability of sureties is now governed by the same principles at law as in equity; and probably, with few exceptions, the same considerations which are sufficient in equity to discharge the surety will be available for the same purpose at law. *Viele* v. *Hoag*, 24 Vt. 46; *Heath* v. *Derry Bank*, 44 N. H. 174.

Although the remedies at common law extend to fraud, as in the case of gifts and conveyances to defraud creditors and purchasers, yet the prevention of fraud being beyond the reach of the ordinary tribunals, the necessity for the interference of equity to afford an adequate remedy in cases of fraud, even when cognizable at law, soon became manifest. By the rules of law, fraud must be proved or be apparent from the transaction; while in equity, fraud may be inferred from the attendant circumstances, and it may be relieved against in equity when it simply affects third persons not parties to the transaction. Courts of equity have also, where the interests of the public are concerned, entertained jurisdiction on the ground of public policy, irrespective of the circumstances of the case, to declare a transaction void when, owing to the condition of the parties and the difficulty of obtaining positive proof, it is peculiarly open to undue influence. *Barker* v. *Ray*, 2 Russ. 63; *Hoare* v. *Brembridge*, L. R., 14 Eq. 522; S. C., 8 Ch. App. 22; *Baker* v. *Kline*, 106 Mass. 61; *Waddingham* v. *Loker*, 44 Mo. 132; *Jones* v. *Bolles*, 9 Wall. 364. See *post*, title *Fraud*.

An old head of equitable relief, which also forms a ground of the modern jurisdiction, comprises cases in which, though the law professes to give a remedy, such remedy is deemed inappropriate, or insufficient. An instance is the want of a remedy at common law to compel the delivery of some article of peculiar value wrongfully withheld, where its loss cannot be compensated in damages (*Wallwyn* v. *Lee*, 9 Ves. 33; *Somerset* v. *Cookson*, 3 P. Wms. 390; *Hull* v. *Clark*, 14 Sm. & M. 187; *Dudley* v. *Mallery*, 4 Ga. 52; Story's Eq. 709); or where possession has been improperly acquired by one standing in a fiduciary relation to the plaintiff. *Wood* v. *Rowcliffe*, 2 Phill. 382; 3 Hare, 304. Sometimes the aid of a court of equity is invoked on account of inability to describe the property with the certainty required at law.

Another instance is the fraudulent suppression or destruction of written instruments.

It was on the ground of the inadequacy of the remedy at law that the court of chancery originally entertained jurisdiction to enforce the specific performance of contracts, and bills for that purpose are among the earliest recorded. This most useful means of equitable redress continues to be exercised, the general common-law rule being that only pecuniary damages can be given for an injury resulting from a failure to fulfill an agreement. Vol. 1, 14. And see *post*, title *Specific Performance.*

Courts of equity possess an inherent jurisdiction over infants and their estates; their authority in this regard being embraced in every general legislative or constitutional grant of equity powers. *Williamson* v. *Berry*, 8 How. (U. S.) 555; *McCord* v. *Ochiltree*, 8 Blackf. 15; *Ex parte Crumb*, 2 Johns. Ch. 439. The ground of jurisdiction is the doctrine of trust; a guardian being in fact a trustee, and, as such, amenable for misconduct, to a court of equity, and like other trustees subject to removal, and to have another trustee appointed in his place. *Disbrow* v. *Henshaw*, 8 Cow. 349.

The quieting of possession under clear and ascertained titles has always been a subject of equity jurisdiction. A somewhat analogous jurisdiction is that of compelling a person having a *prima facie* right of action to put it in suit within a reasonable time, and in default, to protect the party liable, from being molested at law. 1 Spence's Eq. 658; *Baker* v. *Shelbury*, Freem. Ch. 184.

Another head of equity jurisdiction is that in which the court has interfered on the application of some of the parties interested in a purely legal question, either by originating legal proceedings, or taking control of legal proceedings in order to prevent a multiplicity of suits, or a course of uncertain and vexatious litigation. *Jesus College* v. *Bloom*, 3 Atk. 262; *Ryle* v. *Haggie*, 1 Jac. & W. 236.

The jurisdiction of equity in interpleading suits is a notable instance of the control assumed by the court over legal proceedings in order that the question may be properly determined. The ground of the jurisdiction is, that there is either no remedy at law, or the legal remedy is inadequate in the given case. Mitf. Eq. Pl., by Jeremy, 49, note *h*. When two or more persons claim the same thing by separate titles, and the person against whom the demand is made has not the means of knowing to which of the parties he ought to render the debt or duty, all he can do at law is, to put each to prove his title. It is, therefore, obviously necessary that the claimants shall be made to litigate the question between themselves, so that there may be payment only to the

person who establishes his title. This relief is afforded, not only where both the claims are legal, but also where one is legal and the other equitable. *Richards* v. *Salter*, 6 Johns. Ch. 445; *Ramsdell* v. *Butler*, 60 Me. 216. And see *post*, title *Interpleader*. The same principle was acted on at common law, in cases of bailment. *Crawshay* v. *Thornton*, 2 Mylne & Craig, 1. See *Interpleader*.

The granting of injunctions is one of the most important heads of equity jurisdiction; and it is oftener and more beneficially called into exercise than perhaps any other. The ground of its exercise is that there is either no remedy at law, or that the legal remedy is imperfect and inadequate. It is more frequently employed to prevent a meditated wrong than to redress an injury already committed. Its object may be to protect equitable rights, or to prevent injury to legal rights. It may be issued to restrain proceedings at law instituted in violation of equitable rights, or to protect equities when injury is threatened otherwise than by legal proceedings. See *post*, § 12; *art.* 2, § 1. See *Injunction*.

§ 2. **When jurisdiction exists.** As a correct idea of the nature and extent of equity jurisdiction cannot be obtained from a general statement, but only from an enumeration of the classes of cases in which it is exercised, a more full consideration of the subject has been reserved for this, and subsequent sections in the present and the succeeding article.

The jurisdiction of courts of equity may be divided into EXCLUSIVE, CONCURRENT, and AUXILIARY. Under the first of these divisions, which, in order to avoid repetition, will alone be treated in this section, may be ranged the following heads: Trusts in general; Equitable jurisdiction in reference to the property of married women; Infants, idiots, and lunatics; Mortgages; Assignments; Wills; Election; Liens.

The concurrent jurisdiction is treated *post*, § 10; and the auxiliary jurisdiction under art. 2, § 1.

The jurisdiction of equity in matters of trust is for the most part exclusive; though trusts are sometimes cognizable at law, as in bailment, and rights founded on contract, for which an action will lie for money had and received. 3 Bl. Com. 431, 432; 1 Broom & Had. Com. (Wait's ed.) 759. A trust has accordingly been defined, "such confidence between the parties, that no action at law can be maintained, but is merely a case for the consideration of courts of equity." *Sturt* v. *Mellish*, 2 Atk. 612. As a rule, a suit against a trustee, unless he has bound himself by a personal covenant, must be brought in equity. *Duval* v. *Craig*, 2 Wheat. 45.

Where a trust is certain and definite, it will be enforced in equity.

But if it is so vague and indefinite that the court cannot clearly ascertain either its design, or the persons who are the objects of it, it will be held to have failed, and will go to the donor, his heir at law, next of kin, or other person who would have been entitled, if there had been no specific act of disposition. *Wheeler* v. *Smith*, 9 How. (U. S.) 79; *Lambe* v. *Eames*, L. R., 6 Ch. App. 597; *Aston* v. *Wood*, L. R., 6 Eq. 419; Story's Eq. Jur., § 979.

Courts of equity, in the exercise of their jurisdiction in relation to trusts, are governed by the intention, which when it does not contravene the policy of the law, or the rules and maxims governing the rights and incidents of property, they will give effect to, without regard to form. 2 Spence's Eq. 25.

A court of equity will exercise its power to prevent the conduct of the trustee from prejudicing the *cestui que trust;* and an unnecessary delay on the part of the trustee will not be permitted to afford a benefit to himself, or others. *Sitwell* v. *Bernard*, 6 Ves. 520, 538; *Elwin* v. *Elwin*, 8 id. 554; *Walker* v. *Shore*, 19 id. 392. The trustee will, however, be allowed the free exercise of all the power essential to the due execution of the trust. There may be cases in which the court will put the *cestui que trust* for life in possession of the property, although the testator seems to have meant that it should remain with the trustee; the court considering that as possession will be beneficial to the *cestui que trust*, in letting him into possession, and at the same time taking measures to secure the protection of the property for the benefit of those in remainder, it in substance performs the trust according to the intention of the testator. 2 Spence's Eq. 45. And see *Tidd* v. *Lister*, 5 Mad. 432; *Blake* v. *Bunbury*, 1 Ves. 194.

If the trustee declines to act, or is incapable of acting, the want or failure of a trustee will be supplied by the court; and the court will take upon itself the execution of the trust. *Ellison* v. *Ellison*, 6 Ves. 663; S. C., 1 Eq. Lead. Cas. 382–447, 4th ed.

Sometimes a trust is imposed which is a mere power or authority to exercise a discretion as to the disposal of property. Where a power partakes of the nature of, or is coupled with a trust, a court of equity will enforce the execution of it, even though the power be extinguished at law by the death of the donee of it, or otherwise. *Brown* v. *Higgs*, 8 Ves. 570; *Withers* v. *Yeardon*, 1 Rich. Eq. 324; *Chase* v. *Chase*, 2 Allen, 101; *Whiting* v. *Whiting*, 4 Gray, 240; *Smith* v. *Bowen*, 35 N. Y. 83. Where a trustee has a discretionary power which he honestly exercises, equity will not control his judgment. But if he has not exercised his discretion, and has acted for improper motives, the court

will avoid the appointment, and divide the property among all the objects equally.

Courts of equity have jurisdiction over all persons occupying the position of trustees to control them in the exercise of their power, and to assist and protect them whenever there is any difficulty or impediment, and they ask the aid of the court, or its direction, in relation to the establishment, management, or execution of the trust. The court will remove trustees and substitute others, whenever it is essential to the due exercise of the trust, even when they may have been guilty of no misconduct, and wish to remain. And whenever there is a failure of trustees, the court will appoint new ones. *Ellison* v. *Ellison*, 6 Ves. 663; *January* v. *Rutherford*, 9 Paige, 273; *Att.-Gen.* v. *Garrison*, 101 Mass. 223; *Att.-Gen.* v. *Coopers' Company*, 19 Ves. 187, 192.

One of the most frequent and important of the purposes for which trusts were formerly created was, to secure the property of married women to their separate use. At common law the husband, upon marriage, became entitled to an estate during the joint lives of himself and his wife, in her freehold property, which estate, upon the birth of issue, was enlarged into one for his own life. His wife's personalty became his absolutely, subject only to the necessity of reducing it into possession during coverture. Where the husband is entitled in right of the wife to property which he cannot recover at law, and the intervention of a court of equity is sought, the court allows the husband to receive the property, subject to the wife's equity to a settlement; that is, upon the terms of his settling upon her and her children, if she desire, a share of the property acquired by him through her. *Gardner* v. *Marshall*, 14 Simons, 575; *Vaughan* v. *Buck*, 1 Simons (N. S.), 284. And the wife may herself assert the equity, either by bill or petition. *Elibank* v. *Montolieu*, 5 Ves. 737.

Equity secured to a woman during coverture, through the medium of a trust, the beneficial enjoyment of her property free from the husband's control, and from liability for his debts. When it was established in equity that the wife might enjoy her separate estate as a *feme sole*, the laws of property came to be attached to this new estate, and as a part of such laws, the power of alienation. As this power was found destructive of the security intended for such property, and prohibitions against alienation introduced, courts of equity supported the validity of such prohibitions, in order to secure the rights of the wife. The English common-law rule having been changed by statute in most of the States, whereby the real and personal estate of a married woman is continued her sole and separate property, not subject to the disposal of her husband. nor liable for his debts, very much of the learning in relation

to the equitable separate estates of *femes covertes* is no longer of practical importance. In Maryland, a bill in equity by the legal representative of the wife against the legal representatives of the husband, to obtain possession of her choses in action not reduced to possession by him, to which the plaintiffs were entitled under the statute, was sustained, there not being a complete and adequate remedy at law. *Gough* v. *Crane*, 3 Md. Ch. 119.

At law, a contract between a man and a woman is extinguished by their subsequent marriage; and a contract made between husband and wife is void. Equity so far disregards the fiction of law which deems the marriage as occasioning a unity of person between husband and wife, and merging the latter in the former, as frequently to allow them to have adverse interests and rights, and when necessary, to proceed against each other for their enforcement. Equity will uphold and carry into effect an *ante-nuptial* agreement for a settlement even without the intervention of trustees, when its enforcement will be in furtherance of the manifest intention of the parties. *Strong* v. *Skinner*, 4 Barb. 546. A *post-nuptial* contract may likewise sometimes be enforced in equity, and a wife even allowed to be a creditor of her husband, and to enforce her rights against him, and those claiming under him. Equity will enforce gifts and grants from a husband to his wife; and also from a wife to her husband, if satisfied that there was no duress or compulsion. Although an agreement between husband and wife for future separation is void, yet it has been held otherwise as to an agreement for immediate separation (*Calkins* v. *Long*, 22 Barb. 97, 110, *n.*; *Blaker* v. *Cooper*, 7 Serg. & R. 500; *Nichols* v. *Palmer*, 5 Day, 47; *Fisher* v. *Filbert*, 6 Penn. St. 61. See *Husband and Wife*); and covenants in a deed of separation executed under a decree of court will be enforced in equity. Id.

In some of the States special tribunals have jurisdiction over the persons and estates of infants, and the care of persons and estates of idiots and lunatics is regulated by statute; while in other States jurisdiction in these several cases is still exercised by courts of equity.

The jurisdiction of the court of chancery over infants, so far as relates to their property, is very ancient, and probably coeval with the first establishment of the court. It exercised a control over legal guardians at a very early period — removing them in a proper case, or compelling them to give security. The court has also taken charge of the maintenance and education of infants, directing the application of the income of their estates for that purpose, and giving and enforcing particular direction as to where and how the infant shall be educated. 1 Spence's Eq. 612, 613; *Ex parte Phillips*, 19 Ves. 122; *Wellesley* v.

Duke of Beaufort, 2 Russ. 20. The court has exercised nearly the same control over testamentary guardians as over guardians who derived their authority from the court; not indeed removing a testamentary guardian, but depriving him of authority, when it has been deemed essential to the interests of the infant. *Beaufort* v. *Berty*, 1 P. Wms. 704.

Where the father from gross cruelty or immorality is an unsuitable person to act as the guardian of his infant children, a court of equity will either deprive him of their custody and management, or control him therein. If the conduct of the guardian, though reprehensible, does not call for his removal, the court, upon special application, will interfere and direct him in the discharge of his duties. It will exercise a watchful care over the guardian in the management of the infant's estate; and if a stranger intrudes upon it and takes the profits, he will be treated and held responsible as a guardian. *Dormer* v. *Fortescue*, 3 Atk. 129; *Hutton* v. *Simpson*, 2 Vern. 724. In case it is decidedly for the infant's benefit to change the nature of the property, the guardian will be permitted to do so; and in order to protect the rights of persons who as heirs or next of kin would, in the event of the infant's death, be entitled to the property, equity will regard land which has been purchased by the guardian with the infant's personalty as personal estate, and the proceeds obtained from the sale of the infant's land, or by the felling of timber thereon, as real estate. The court, upon application, will investigate the matter, and will order all money or property which may be thus obtained, to be held in trust for such persons as would have been entitled to the original property. See *Ware* v. *Polhill*, 11 Ves. 278; *Clay* v. *Brittingham*, 34 Md. 675; *Kann's Estate*, 69 Penn. St. 219.

In relation to the jurisdiction of equity over lunatics, it may be sufficient to say, that, after the fact of lunacy has been ascertained by a commission in the nature of a writ *de lunatico inquirendo*, a committee is appointed by the court to take care of the person and estate of the lunatic; and an allowance will be made by the court for the lunatic's support.

The jurisdiction as to the equity of redemption of mortgaged premises, so far as concerns co-existent legal rights, is in some respects analogous to that which is exercised over trust estates; the court to a certain extent controlling the legal incidents of the estate, and making it subservient to the purposes for which it is created, to wit: security only. The estate in the hands of the mortgagee and his representatives is deemed, for almost all purposes, personal estate. The equity of redemption is regarded as an estate in the land, and as having all the

qualities and incidents of real estate; and when the mortgage money is paid the mortgagee becomes in the nature of a trustee for the mortgagor. *Holeridge* v. *Gillespie*, 2 Johns. Ch. 30; *Rakestraw* v. *Brewer*, 2 P. Wms. 511; 1 Spence's Eq. 604, 605. Equity, holding that the time for redeeming is not of the essence of the contract, permits the mortgagor, or those claiming under him, to redeem or get back the estate, on payment to the mortgagee, or those claiming under him, of the principal debt and interest, together with the costs and charges properly incurred.

Although, whether the mortgagor be in possession or not, he is considered until foreclosure, for most purposes, excepting where the interests of the mortgagee may be affected, as the owner of the estate, yet he will not be permitted to do any acts which may so diminish the value of the estate as to jeopardize the security of the mortgagee; and if he commit or attempt to commit acts of waste, he will be restrained from so doing by injunction. *Robinson* v. *Litton*, 3 Atk. 210; *Brady* v. *Waldron*, 2 Johns. Ch. 148; *McMullen* v. *Harbert*, 7 Phil. (Penn.) 325. The mortgagee in possession will be allowed for necessary repairs, but not for improvements which so increase the value of the property as to lessen the power of redemption; and he will not be permitted to damage the estate. *Sandon* v. *Hooper*, 6 Beav. 246. And see *Hidden* v. *Jordon*, 32 Cal. 397; *Harper's Appeal*, 64 Penn. St. 315; *McSorley* v. *Larissa*, 100 Mass. 270; *Phoenix* v. *Clark*, 2 Halst. (N. J.) Ch. 447.

Upon payment of what is due upon the mortgage, the mortgagee cannot lawfully refuse to restore to the mortgagor, or those claiming under him, the estate which has been vested in him as mortgagee, it being immaterial to him whether the mortgagor's title is good or bad. But the mortgagor cannot file a bill to redeem until after the time for the payment of the mortgage money has expired. *Brown* v. *Cole*, 14 Sim. 428. Upon the expiration of that time the mortgagor is entitled (unless the mortgagor or his representatives have been allowed to remain in possession for twenty years without payment of interest, or any acknowledgment of the mortgage) to file a bill praying that the mortgagor may either redeem the estate, or be foreclosed of his equity of redemption. It is not a defense to the bill that the mortgagee has taken the mortgagor in execution. *Davis* v. *Battine*, 2 Russ. & M. 76. But if the debt has been recovered in the one way, it cannot of course be enforced in the other.

If the debt is secured by a mortgage of real estate, and also by covenant, and collaterally by a bond, the mortgagee may pursue all his remedies at the same time. If he obtain full payment on the bond or covenant, the mortgagor is, by the fact of payment, entitled to redeem

the estate, and foreclosure is prevented. But if the mortgagee obtains only part payment on the bond or covenant, he may proceed with his foreclosure suit, and giving credit on account for what he has recovered on the bond or covenant, he may foreclose for non-payment of the remainder. 2 Spence's Eq. 682. And see *Lockhart* v. *Hardy*, 9 Beav. 379; *Schoole* v. *Sall*, 1 Sch. & Lefr. 176; *post*, title *Foreclosure*.

Where a written instrument is intended by the parties as a security for money, it is regarded in equity as a mortgage, whether the intention appears from the same or from a different instrument; and in case of fraud, accident or mistake, it may be proved by parol, that a conveyance absolute on its face was intended to be a mortgage. *Marks* v. *Pell*, 1 Johns. Ch. 594; *Bank of Westminster* v. *Whyte*, 3 Md. Ch. 508; *Bentley* v. *Phelps*, 2 Woolb. & M. 426; *Howe* v. *Russell*, 36 Me. 115; *Bigelow* v. *Topliff*, 25 Vt. 273.

In the case of a mortgage of personal property, if the condition is not performed, the title vests absolutely in the mortgagee, and after a breach of the condition he may, upon due notice, sell the property. There exists, however, an equity of redemption which may be asserted within a reasonable time. *Hart* v. *Ten Eyck*, 2 Johns. Ch. 100; Vol. 1, 206.

The remedy to redeem a pledge, in consequence of the right of property remaining in the debtor, is frequently attainable by an action at law, without resort to equity, after payment or tender of the amount due; excepting in some special cases, such as the necessity for an account or discovery, or for a re-assignment of the property. *Hasbrouck* v. *Vandervoort*, 4 Sandf. 74. At common law the pledgee might bring a suit to compel the pledgor to redeem by a given day, or be forever foreclosed of his right. The modern practice is to file a bill in equity to foreclose and sell the pledge; or for the pledgee to sell after the time for redemption has passed, upon notice to the pledgor. The former is the safer course, as it has been doubted whether the pledgee, without a judicial decree of sale, can convey a title divested of the right of the pledgor to redeem. Story's Eq. Jur., § 1033; *Stearns* v. *Marsh*, 4 Denio, 227; *Strong* v. *National Mechanics' Bank Ass.*, 45 N. Y. 718; *Worthington* v. *Tormey*, 34 Md. 182; *Luckett* v. *Townsend*, 3 Texas, 119. In the case of a mortgage or pledge of personal property, the mortgagee can compel the mortgagor, upon an application to redeem, to pay debts subsequently contracted with the mortgagee; the presumption being that the pledgee would not have loaned the new sum, except upon the credit of the pledge already in his hands. *Adams* v. *Claxton*, 6 Ves. 229; *Jarvis* v. *Rogers*, 15 Mass. 389.

General assignments by debtors, either with or without preferences

of particular creditors, constitute an important branch of special trusts. They are peculiar objects of equity jurisdiction, which by its power to enforce a discovery and account, and to make all the creditors as well as the debtor parties to the suit, is often the only tribunal competent to afford adequate relief. Such an assignment has been held valid, notwithstanding it contains a stipulation that the creditors, for whose benefit it is made, shall release the debtor from all further claim beyond the property assigned. See *Halsey* v. *Whitney*, 4 Mas. (C. C.) 206; *Brashear* v. *West*, 7 Pet. 608; *Fairchild* v. *Hunt*, 1 McCart. (N. J.) 367. But see *Austin* v. *Bell*, 20 Johns. 442; *Stickney* v. *Crane*, 35 Vt. 89.

Where a creditor directs the debt, or a part of the debt, to be paid to a third person, it will amount in equity to an assignment of the debt, and will be enforced notwithstanding the debtor did not assent to it. *Morton* v. *Naylor*, 1 Hill, 583; *Gibson* v. *Finley*, 4 Md. Ch. 75. If a bill be sent to an agent for collection, with instructions to collect and pay over the proceeds to particular creditors who have notice, and assent thereto, in equity, the agent will be deemed a trustee for the creditors, and they may maintain a suit against him to enforce the trust. Story's Eq. Jur., § 1045. And see *Jeffs* v. *Day*, L. R., 1 Q. B. 372. An order to pay a debt out of a fund belonging to the debtor is an equitable assignment of the fund *pro tanto*. *Morton* v. *Naylor*, 1 Hill, 583. An order drawn on a fund for the whole of it is an equitable assignment of the fund after notice to the drawee; but not where the order is drawn for only a part of the fund, unless the drawee accept the draft; or unless an obligation to accept may be implied from the custom of trade or the course of business between the parties. *Mandeville* v. *Welch*, 5 Wheat. 286.

Where the assignor of a debt has collateral security, the assignee will be entitled to the benefit of the security in the absence of an agreement to the contrary between the parties. *Foster* v. *Fox*, 4 Watts & Serg. 92. An assignment of property thereafter to be acquired, although void at law, will be good in equity; as of the future cargo of oil, to be obtained on a whaling voyage. *Robinson* v. *McDonnell*, 5 Maule & Selw. 228; *Langton* v. *Horton*, 5 Beav. 9; *Mitchell* v. *Winslow*, 2 Story, 630; Vol. 1, 243, 244.

To enforce a correct administration of the power conferred by a will, equity has jurisdiction to give a construction to a doubtful or disputed clause therein, when the court is moved in behalf of an executor, trustee, or *cestui que trust*. *Bailey* v. *Briggs*, 56 N. Y. 407. In equity, words in a will, of recommendation, confidence, hope, wish, or desire, are construed as creating a trust; but not where the testator leaves the

subject as purely a matter of discretion (*Sale* v. *Moore*, 1 Sim. 534; *Ex parte Payne*, 2 Younge & Col. 636); nor where the property to which the recommendation attaches is not certain or definite; nor where the previous disposal of the property imports absolute ownership. *Knight* v. *Boughton*, 11 Cl. & Fin. 513 548; *Cary* v. *Cary*, 2 Sch. & Lefr. 189. And see *Gully* v. *Cregoe*, 24 Beav. 185.

Many of the trusts under wills require the direction of a court of equity, as to the persons who are to take, and the nature and extent of their interest in the trust property. Trusts created by wills are usually for the protection of the interests of persons under legal disability; for the payment of debts and legacies; for the sale or purchase of real estate; or for the purposes of charity. Where a testator directs the sale of real estate for the payment of debts, without naming the person who shall sell, a court of equity will either declare who shall execute the trust, or take upon itself the due execution of it. If a will give trustees power to sell land upon a specified trust, which they refuse to do, a court of equity will compel them to execute the power, or will, if necessary, appoint other trustees to discharge the trust. At law, where a mere naked power is given to several, it cannot be executed by one, although the others are dead, for the reason that it is deemed a personal trust in all; but if a power is coupled with a trust, a court of equity will direct its execution. Sugden on Powers, 105–111; *Jackson* v. *Burtis*, 14 Johns. 391. See also, *De Peyster* v. *Clendining*, 8 Paige, 295; *Smith* v. *Kinney*, 33 Tex. 283; *Leeds* v. *Wakefield*, 10 Gray, 514; *Faulkner* v. *Davis*, 18 Gratt. (Va.) 651; *Butler* v. *Gray*, L. R., 5 Ch. App. 26.

Although courts of equity in general have exclusive jurisdiction to compel a party to make an election, yet courts of law recognize the principle when the party is bound by the nature of the instrument, or is concluded by what he has done. The doctrine of election applies in the case of inconsistent and alternative donations, where there is an intention, express or implied, that one shall be a substitute for the rest. If a person, to whom by an instrument of donation a benefit is offered, has a claim on the donor, and there is an evident intention that he shall not both receive the benefit and enforce the claim, he cannot obtain the former without renouncing the latter. Again, if an instrument of donation applies to the property of another, and there are expressions in the instrument which, if the property were the donor's, would amount to a disposal of it to a third person, the owner of the property must either relinquish the benefit (to the extent at least of indemnifying him whom by depriving of the intended disposition he disappoints), or, if he accepts the benefit, must complete the intended

disposition. The intention being assumed, the conscience of the donee is affected by the condition annexed to the proposed benefit; and he cannot accept the benefit while he declines the burthen. *Dillon* v. *Parker*, 1 Swanst 394, note *b*.

In equity, election principally arises where a testator or grantor assumes to dispose of that which belongs to another person, and by the same instrument gives such person other property, or some benefit; in which case the donee must elect whether he will keep his own, or allow it to go according to the donor's wishes. See *O'Reilly* v. *Nicholson*, 45 Mo. 160; *McElfresh* v. *Schely*, 2 Gill. (Md.) 182; *Stokes' Estate*, 61 Penn. St. 136; *Thompson* v. *Thompson*, 2 Strobh. (S. C.) 48.

Although liens are recognized and enforced at law, yet courts of equity alone take cognizance of equitable liens. Equity will treat a judgment as in the nature of a lien upon the equitable interest of the debtor in land. Where there is a specialty debt binding the heirs, a lien attaches upon the lands descended; and equity will compel an account of the rents and profits, and, when necessary, decree a sale of the inheritance. *Curtis* v. *Curtis*, 2 Bro. Ch. 620, 633.

The foundation of a lien at common law being possession, the lien is in general lost when the possession is abandoned. But liens in equity arising from constructive trusts are independent of the possession of the things to which the liens are attached. Of this nature is the lien of the vendor of real estate for the purchase-money, which arises whether the estate be conveyed or only contracted to be conveyed, and notwithstanding there was no special agreement to that effect; and which may be enforced by the vendor's personal representatives, and also in favor of legatees and creditors when the vendor seeks payment out of the personal assets of the vendee. *Mackreth* v. *Symmons*, 15 Ves. 339; *Cheesebrough* v. *Millard*, 1 Johns. Ch. 409. The lien prevails against purchasers from the vendee with notice, or who have only an equivalent title; but not against *bona fide* purchasers for a valuable consideration without notice, or assignees under an assignment to specified creditors. It exists against assignees by a general assignment; against a claim of dower by the wife of the vendee, and against judgment creditors of the vendee. Story's Eq. Jur., §§ 1218–1229; *Champion* v. *Brown*, 6 Johns. Ch. 398; *Bayley* v. *Greenleaf*, 7 Wheat. 46; *Schwarz* v. *Stein*, 29 Md. 112; *Huguenin* v. *Cochrane*, 51 Ill. 302; S. C., 2 Am. Rep. 303; *Cocke* v. *Bailey*, 42 Miss. 81; *Green* v. *Demoss*, 10 Humph. (Tenn.) 371. The burden of proof is on the vendee to show that the lien has been waived, notwithstanding the conveyance recites that the consideration has been paid and a receipt indorsed on it, or security taken. In some of the States the vendor's lien is

not recognized. Bispham's Eq., § 553. See 1 Lead. Cas. Eq. (4th Am. ed.) 481 *et seq.* When the vendor of land is unable to make title the vendee has a lien on it for the purchase-money paid by him (*Wythers* v. *Lee*, 3 Drew. 396; *Rose* v. *Watson*, 10 H. L. Cas. 672); and when there is an agreement that the purchase-money shall be placed in the hands of a third person to be applied in discharge of prior incumbrances, there is a lien on the purchase-money in favor of the vendee. Story's Eq. Jur., § 1231.

The court will often control the effect of a judgment obtained subsequent to a contract for the sale of land, notwithstanding the judgment is a legal lien. The reason sometimes given for this is, that the judgment, although a lien, is not a specific lien on the land. That is, the creditor did not go on the security of the land, but trusted to the general credit of the debtor and his estate. In equity, general creditors are considered bound by a particular equity, and are not so much favored as one who has obtained a specific lien on the faith of which he advanced his money. *Lane* v. *Ludlow*, 2 Paine's C. C. 591.

Where a person owning an estate stands by and permits another innocently to make improvements on the land, thinking that he has a title to it, the person making the improvements will have a right to compensation. *Shine* v. *Gough*, 1 Ball & B. 444. See, also, *Bright* v. *Boyd*, 1 Story, 478; S. C. affirmed, 2 id. 605; *Smith* v. *Drake*, 23 N. J. Eq. 302; *Sole* v. *Crutchfield*, 8 Bush (Ky.), 636; *Miner* v. *Beekman*, 50 N. Y. (5 Sick.) 337. And where the owner of land agrees to sell it and to lend money to the purchaser for improving it, he has a lien for the advances so made, as well as for the purchase-money. *Ex parte Linden*, 1 Mont. D. & D. 435.

When two or more persons make a joint purchase, and afterward one of them lays out money in repairs and improvements, he has a lien on the land therefor. The lien in such case is not, strictly speaking, allowed on account of the repairs and improvements, but on the ground that when a tenant in common applies to equity for a partition, as he asks equity he must do equity. *Swan* v. *Swan*, 8 Price, 518; *Jackson* v. *Jackson*, 9 Ves. 596; *Norway* v. *Rowe*, 19 id. 159.

A trustee has a lien upon the trust estate for his expenses so long as it remains a trust estate; but it is otherwise as to the persons employed by the trustee. *Worrall* v. *Harford*, 8 Ves. 48.

§ 3. **When jurisdiction does not exist.** This occurs when it appears on the face of the bill that the subject is not cognizable in any court of justice; when the case stated shows that the alleged acts of

the defendant are not contrary to equity, or that the complainant has a perfect remedy without the assistance of the court; where the subject-matter of the suit is exclusively cognizable at law; where the case is of a local nature arising in a foreign jurisdiction, or in a place where the process of the court cannot run. And it may be objected that there is a disability in the plaintiff to sue, or in the defendant to be sued; or that another suit is pending in relation to the same matter in the court itself, or in some other court of competent jurisdiction. Adams on Eq. 331; 4 Bouv. Inst. 438 *et seq.* But the fact that another suit is pending in the same court for the same cause is a good answer only when the whole of the relief sought in the second suit can be obtained in the first. *McKaig* v. *Piatt*, 34 Md. 249.

When the court has not jurisdiction, it cannot be conferred by the defendant's appearing and answering without objection (*Brown* v. *Bank of Miss.*, 31 Miss. 454); nor by consent. *Benford* v. *Daniels*, 20 Ala. 445; Vol. 1, 50. If a statute has prescribed a rule free from doubt and ambiguity, a court of equity has no power to dispense with its requirements, or to relieve contrary to its provisions. *Stone* v. *Gardner*, 20 Ill. 304; Fonb. Eq., B. 1, ch. 11, § 3.

A court of equity has no jurisdiction in cases of tort to give relief in damages for the injury, although the party aggrieved be not able, in consequence of the absence of the defendant from the State, to proceed at law. But where a judgment has been rendered for the amount, a court of equity will lend its aid to remove obstacles in the way of its collection; and a bill may be filed for that purpose. *Meres* v. *Chrisman*, 7 B. Monr. 422. And where a tort respecting property arises from fraud of the agent, a court of equity will treat the loss sustained as a debt against his estate. *Lord Hardwicke* v. *Vernon*, 4 Ves. 418. So if a person wrongfully enter upon an infant's land and takes the profits, he may be compelled in equity to account for them as guardian or trustee of the infant. 1 Story's Eq. Jur., § 511; *Carey* v. *Burtie*, 2 Vern. 342.

Courts of equity have no inherent power to declare liens against real estate to secure debts which may be established against the person, or to decree permanent alimony. *Perkins* v. *Perkins*, 16 Mich. 162. As money advanced on a parol contract for the purchase of land creates no lien on the land for the repayment of the money so advanced, the court, upon a bill filed for an account, has no power to decree a sale of the land for the satisfaction of the money so ascertained to be due. *McNew* v. *Toby*, 6 Humph. 27. Where there is no actual prosecution of a paramount title or incumbrance, the insolvency or non-residence of the vendor will not, when coupled with the mere existence

of such title or incumbrance, give to the purchaser a right to equitable relief. *Worthington* v. *Curd*, 22 Ark. 277. There is no remedy in equity against the heirs at law of an intestate who failed to keep his parol agreement to devise to the complainant the land descended. *Morgan* v. *Tillet*, 2 Jones' Eq. 39.

A court of equity has not jurisdiction to annul or revoke the charter of a corporation. *Fountain Ferry Turnpike Road Co.* v. *Jewell*, 8 B. Monr. 140. Equity has no general supervisory power over the government of municipal corporations, or over the acts and proceedings of their governing bodies. It will only interfere where the rights of the individual prosecuting have been either injured or menaced in a matter falling under some recognized head of equity. *Phelps* v. *City of Watertown*, 61 Barb. 121.

A court of equity has not jurisdiction to determine the right to an office, unless in the particular case the courts of law cannot afford adequate relief (*Hartt* v. *Harvey*, 32 Barb. 55); nor to restrain an officer who is endeavoring to collect an execution illegally issued; the court of law having power to correct its own process. *Poston* v. *Southern*, 7 B. Monr. 289. But where public officers propose to do an act which would be useless to the public, and injurious to an individual, a court of equity may take jurisdiction to prevent irreparable injury. *Green* v. *Green*, 34 Ill. 320, 327.

Persons who have distinct claims growing out of independent contracts, with nothing to show a common interest in the subject-matter, cannot unite in a bill to enforce such claims. Therefore, separate purchasers of different parcels of the same land cannot join as plaintiffs in a suit against the vendor, to restrain the prosecution of separate ejectment suits commenced by him against them. Nor can they join in a bill against the vendor to compel the specific performance of a previous contract for the sale and purchase of such land between him and another person, on the ground that such contract has been assigned to one of the plaintiffs for himself, and to protect the interests of his co-plaintiffs; there being nothing to show, beyond the allegation in the bill, that the assignment of the contract was for the benefit of all the plaintiffs, or made at their request, or with their assent. *Wood* v. *Perry*, 1 Barb. 114.

A court of equity has no jurisdiction to compel a person, who is not a party to the suit, to hand over books and papers in his possession with a view to their delivery to a receiver. If the books are needed as evidence upon a reference, the person should be served with a subpœna *duces tecum* to attend with the books and testify in relation to them. They cannot be taken out of the possession of the witness without his

consent, or used for any other purpose than as evidence upon the reference. If possession of the books is desired, on the ground that they are improperly held, the person having them should be made a party to the suit, either by an amendment of the bill, or otherwise. *Morley* v. *Green*, 11 Paige, 240.

§ 4. **Jurisdiction, how affected by residence.** A court of equity, when some of the parties are not within its jurisdiction, will sometimes proceed against those who are, and afford relief, if it can be done consistently with the merits of the case, and the rights of the absent parties. The power of the court to proceed to decree in the absence of parties will depend upon the nature of their interest, and the mode in which it will be affected by the decree. If they are mere passive objects of the judgment of the court, or their rights are incidental to those of the parties before the court, a complete determination may be obtained without them. But if they are active in performing the decree, or if they have rights wholly distinct from those of the other parties, the court cannot proceed to a determination in their absence. Adams on Eq. 322, 323; Mitf. Eq. Pl. 32; *Browne* v. *Blount*, 2 Russ. & M. 83; *Willats* v. *Busby*, 5 Beav. 193. Where, in a suit to recover a debt against the estate of a deceased partner, the other partners are out of the jurisdiction of the court, they need not be made parties, unless the case involves important rights of the absent partners, or the facts are mainly in their knowledge, or the circumstances occurred in the place where they reside. *Vose* v. *Philbrook*, 3 Story, 336.

When the statute limits the jurisdiction to the county in which the defendant resides, the bill will be dismissed on motion, if it appears on its face that the defendant is a resident of a different county. *Porter* v. *Worthington*, 14 Ala. 584; *Birchard* v. *Cheever*, 40 Vt. 94; *Smith* v. *Iverson*, 22 Ga. 190. Where the record shows that none of the parties are within the jurisdiction, and that the court can only derive jurisdiction from the subsequent assent of the defendants, such subsequent assent can only operate upon those parties who give it, and cannot affect others as to whom the court had no jurisdiction before, and whom it had no power to coerce and bring within its jurisdiction. *Kennedy* v. *Davenport*, 13 B. Monr. 167.

Under a statute providing that the suit shall be commenced where the defendants, or a major part of them, reside, a plea to the jurisdiction alleging that only two of the four defendants are residents of the county where the proceedings are had, without stating where the other two defendants reside, is bad, within the rule that any plea to the jurisdiction must give a better writ, and show affirmatively that some other court can take jurisdiction. *Lester* v. *Stevens*, 29 Ill. 155.

The question of jurisdiction, as connected with the residence of the defendant, does not extend to bills for mere discovery (*Smith* v. *Iverson*, 22 Ga. 190); and where the defendant in an action at law files a bill in the same county against the plaintiff, who resides in a different county, asking relief and an injunction, the jurisdiction may be held good for the latter and not for the former. *Kay* v. *Robison*, 29 Ga. 34.

§ 5. **Jurisdiction, how affected by locality.** As equity acts primarily *in personam*, the court has jurisdiction in cases of fraud, trust, or contract, wherever the person against whom relief is sought is found, notwithstanding property not within the jurisdiction of the court may be affected by the decree (*Deklyn* v. *Watkins*, 3 Sandf. Ch. 185; *MacGregor* v. *MacGregor*, 9 Iowa, 65; *Massie* v. *Watts*, 6 Cranch, 148; *Ulrici* v. *Papin*, 11 Mo. 42); and the court will decree the settlement of the accounts between the parties, and the payment of the balance, if any be found due, and will enforce such decree *in personam*. *Wood* v. *Warner*, 15 N. J. Eq. (2 McCart.) 81; Vol. 1, 21.

The boundary of land situated out of the jurisdiction may be settled by a decree for the specific performance of the contract. *Penn* v. *Lord Baltimore*, 1 Ves. 446; Vol. 1, 21. The defendants may be compelled either to bring property in dispute, or to which the complainant claims an equitable title, within the jurisdiction of the court, or to execute such a conveyance or transfer of it, as will be sufficient to vest the legal title as well as the possession of the property, according to the *lex rei sitæ*. *Mitchell* v. *Bunch*, 2 Paige, 606; *Great Falls Manf. Co.* v. *Worster*, 23 N. H. (3 Fost.) 462. The court may compel the specific performance of a contract for the sale of land, or set aside a fraudulent conveyance of land situate in another State. *Sutphen* v. *Fowler*, 9 Paige, 280; *Newton* v. *Bronson*, 13 N. Y. (3 Kern.) 587; *Gardner* v. *Ogden*, 22 id. (8 Smith) 327. And the court will decree the cancellation of a void mortgage which is an apparent lien and cloud upon property beyond the jurisdiction of the court. *Williams* v. *Ayrault*, 31 Barb. 364. If a devise of land upon trust can be executed conformably with the intention of the testator, and is valid in the State where the land is situated, a court of the State where the trustees are found may direct them to carry the will into effect, notwithstanding such a devise of land in that State would not be valid. *Hawley* v. *King*, 7 Paige, 213. Where the court has jurisdiction of the person, it may, by the ordinary process of injunction and attachment for contempt, compel a defendant to desist from commencing an action at law, either in that or in any foreign jurisdiction. *Mead* v. *Merritt*, 2 Paige, 402. But a suit to enjoin and restrain the defendant from prosecuting his action, already commenced in another State, cannot be maintained. And a plea that a suit is pend-

ing for the same matter in a foreign State or country is not a bar to a suit here; such an objection being only available in the case of a final judgment abroad. *Williams* v. *Ayrault*, 31 Barb. 364.

The courts of this country have no jurisdiction over disputes or claims arising between, or in favor of, our government and a foreign power. Therefore a bill in equity cannot be maintained against persons residing within the jurisdiction of the court, in relation to property and claims thereto which they hold as agents of a foreign government. *Leavitt* v. *Dabney*, 3 Abb. Pr. (N. S.) 469; S. C., 37 How. Pr. 264. So, a court of equity cannot make a decree respecting lands situate in another State, or order trustees to complete contracts for the sale of such lands. *Glen* v. *Gibson*, 9 Barb. 634.

Where the jurisdiction of the court is merely co-extensive with the county, if land is to be subjected, it must be in the court of the county in which the land is situated. If a debt or the effects of a non-resident are to be subjected, it must be in the court of the county in which the effects are situated, if they are in the possession of no one who can be sued. *Milward* v. *Lair*, 13 B. Monr. 207. Where a suit in equity is brought in one county, and property attached which is insufficient to pay the debt, the complainant may prosecute another suit by attachment in another county, and set up the same demand, and allege the same fraudulent disposition of property and fraudulent intention of the defendant. *Savary* v. *Taylor*, 10 B. Monr. 334. A suit in equity, for the reconveyance of land for which it is charged the defendant had by fraud obtained from the complainant a deed of trust, may be brought either in the county in which the land is situated, or in that in which either of the parties reside. *Troutman* v. *Troutman*, 6 Ired. Eq. 232.

§ 6. **What questions left to courts of law.** Where a party has a plain, adequate and complete remedy at law, a bill in equity will not lie. *Spofford* v. *Bangor, etc., R. R. Co.*, 66 Me. 51; *Gray* v. *Tyler*, 40 Wis. 579. A court of equity will not interfere in behalf of a mere legal demand, until the creditor has tried the legal remedies and found them insufficient. *Wheeler* v. *Taylor*, 6 Ired. Eq 225. But to oust a court of equity of jurisdiction on the ground that the plaintiff has a remedy at law, his legal remedy must be obvious, adequate and complete. *Hartford* v. *Chipman*, 21 Conn. 488. The absence of the party from the jurisdiction of the court, and upon whom no service can be made, cannot convert a legal demand into an equitable one, or give a court of equity jurisdiction over a legal demand, unless such jurisdiction is conferred by statute. *Reese* v. *Bradford*, 13 Ala. 837. So, the fact that the remedy at law may not be successful in realizing the fruits of a recovery on account of the insolvency of the defendants, is not of

itself a ground for equitable interference. *Heilman* v. *Union Canal Co.*, 37 Penn. St. 100. Mere claims, threats and assertions, indicating certain designs and intentions against the grantee and the party in possession of real estate, are not a cloud upon the title, and do not present a case for the interposition of a court of equity. *Mad. Av. Baptist Church* v. *Mad. Av. Baptist Church*, 26 How. Pr. 72. See *ante*, Vol 1, 662, 666 *et seq.*

Before complainants, who are simple contract creditors, can resort to a court of equity to collect their debts, or to remove obstacles interposed to their collecting them, they must either show a lien, or that they have obtained judgments at law, the collection of which they cannot enforce without the aid of a court of equity. *Reese* v. *Bradford*, 13 Ala. 837. The remedy in case of loss or injury to a principal from the negligence or misconduct of the agent is not in equity but at law, and the same is true of a mere claim of set-off, unless some peculiar equity is shown. *Vose* v. *Philbrook*, 3 Story, 335.

A court of equity cannot assume to itself the jurisdiction of revising and correcting errors in the proceedings and judgments of courts of law (*Thompson* v. *Meek*, 3 Sneed, 271; *Danaher* v. *Prentiss*, 22 Wis. 311); or to decide that a return to a writ of execution is insufficient, the court out of which the writ issued alone having jurisdiction to determine as to the sufficiency of the writ. *Nelson* v. *Turner*, 2 Md. Ch. 73. So, the question whether or not an execution is void for irregularity is not cognizable in equity. *State* v. *Baker*, 9 Rich. Eq. 521. When the record of a court of law has been lost or destroyed, a court of equity cannot supply it; such power belonging to the court in which the record was made. *Keen* v. *Jordan*, 13 Fla. 327; *Pearce* v. *Thackeray*, id. 574.

Where the ground of controversy is the pecuniary value of land in dispute for which both parties are contending, a court of equity will not interfere except under special circumstances; damages for a breach of the contract being recoverable in an action at law. *Curtis* v. *Blair*, 26 Miss. 309. If objection be made, a court of equity will not entertain jurisdiction of a bill for relief filed by a grantee of land who holds under a deed containing covenants of seizin, warranty, etc., and who has been compelled to surrender the premises in favor of a prior incumbrancer; a court of law being competent to afford a complete remedy by action of covenant. *Ohling* v. *Luitjens*, 32 Ill. 23. Where the principal object is to recover the possession of real estate, a proceeding by bill in equity is not proper, there being an adequate remedy at law by an action of ejectment. *Bobb* v. *Woodward*, 42 Mo. 482. See *Gray* v. *Tyler*, 40 Wis. 579. The general rule is, that in the absence of

fraud there must be a trial and eviction at law, before a grantee, who has gone into possession under covenants of title and warranty, can have relief in a court of equity against his grantor for a return of the purchase-money, or the security for it, on account of deficiency or failure of title. *Vick* v. *Percy*, 7 Smedes & Marsh. 256. The remedy of a purchaser of land under execution to complete the purchase and recover possession and mesne profits is at law, and not cognizable in equity, unless under extraordinary circumstances. *Pell* v. *Lander*, 8 B. Monr. 554; *Burton* v. *Gleason*, 56 Ill. 25. What is waste is properly a question of law, to be determined by a jury; and a court of equity will not restrain an action at law for that purpose. *Van Syckel* v. *Emery*, 18 N. J. Eq. (3 C. E. Green) 387.

Invoking the aid of a court of equity to carry out and enforce the trusts in a deed does not oust the jurisdiction of a court of law to set the deed aside. *Am. Exch. Bank* v. *Inloes*, 7 Md. 380. Although jurisdiction once rightfully asserted by a court of equity, and which will lead to a settlement of all the questions which can arise out of the subject-matter in controversy, will exclude jurisdiction over it by other courts for similar purposes, yet a proceeding to give force and efficacy to a deed will not bar another proceeding to assail the deed as fraudulent. *Keighler* v. *Ward*, 8 Md. 254.

A court of equity will not enforce a contract founded in fraud, especially as against a purchaser of land for value, but will leave the parties to their rights. *Triplett* v. *Witherspoon*, 74 N. C. 475.

§ 7. **When equity will not entertain jurisdiction.** Where a party has a perfect remedy at law, of which he has not been deprived by fraud or accident, or the act of the opposite party, equity will not afford him relief (*Graham* v. *Roberts*, 1 Head, 56; *Thompson* v. *Manly*, 16 Ga. 440; *Lyday* v. *Douple*, 17 Md. 188; *Coughron* v. *Swift*, 18 Ill. 414; *Echols* v. *Hammond*, 30 Miss. 177; *Bassett* v. *Brown*, 100 Mass. 355); especially, where he slumbers upon his rights and deprives himself of them by neglecting the ordinary remedies afforded by courts of law. *Moore* v. *Torrey*, 1 Tex. 42; *City of Peoria* v. *Kidder*, 26 Ill. 351; *Merrill* v. *Gorham*, 6 Cal. 41. And the want of an adequate and complete remedy at law must be shown by the bill. *Woodman* v. *Saltonstall*, 7 Cush. 181.

A person cannot, while prosecuting his claim in a court of law, carry it into equity, on the ground that it is too complex for a court of law, and thus have it before both courts at the same time. *Williams* v. *Sadler*, 4 Jones' Eq. 378. Where the defense has failed in a court of law for want of proof, the same matter cannot be retried in a court of equity, unless there is some special ground therefor. *Powell*

v. *Stewart*, 17 Ala. 719. The latter court will not interfere with a judgment at law, except upon some special equitable ground, such as fraud, unavoidable accident, and the like. *Lockard* v. *Lockard*, 16 Ala. 423. Nor will the court look behind the decree of another court to inquire into the merits of the case, if there was no fraud in the procurement of the decree. *Gifford* v. *Thorn*, 9 N. J. Eq. (1 Stockt.) 702. The rule is the same in courts of law and equity, that a second suit will not be entertained, when the judgment, in the first, still in force, was given by a court of competent jurisdiction, and was for the same subject-matter. But there are exceptions to this rule, in which courts of equity, notwithstanding the purposes of the suit and the subject are the same, will, under peculiar circumstances, entertain a bill and grant relief. *Thornton* v. *Campbell*, 6 Fla. 546.

A court of equity will not entertain jurisdiction upon the naked allegation that it will avoid a multiplicity of suits in a court of law. But where a suitor seeks the aid of a court of equity for the purposes of discovery, it will proceed to adjust the rights of the parties in order to avoid a multiplicity of suits. So, in cases of account, agency, apportionment, general average, contribution, waste or partnership, where equity entertains a suit on grounds cognizable in that court, it will proceed to adjust other matters of which it has only incidental cognizance, in order to avoid a multiplicity of suits. In this, and similar cases, the jurisdiction is consequential rather than original. *Doggett* v. *Hart*, 5 Fla. 215.

It is a well-settled principle that a court of equity will not interfere to prevent a mere trespass, when a complete and adequate remedy can be had by an action at law. *Mechanics and Traders' Bank* v. *Debolt*, 1 Ohio St. 591. The separate repetition of trespasses laying a ground for separate suits between the same parties is not that description of multiplicity of suits which induces equity to interfere. Where, however, many parties and different rights are involved in the same transaction, all of which cannot be legally adjusted without suit, it is sometimes deemed a ground for the interference of equity. *McCoy* v. *Corporation of Chilicothe*, 3 Ohio, 370.

A court of equity will not entertain jurisdiction in cases of confusion of boundaries on the ground that the boundaries are in controversy. See Vol. 1, 720.

But there must be some equity in consequence of the acts of the parties; such as fraud, gross negligence, omission, or misconduct *Dickerson* v. *Stoll*, 8 N. J. Eq. (4 Halst.) 294; *Topp* v. *Williams*, 7 Humph. 569. Nor will the court interfere to quiet the possession of

a party who has acquired a legal title by adverse possession. *Wolcott* v. *Robbins*, 26 Conn. 236.

A court of equity will not determine whether there has been any irregularity in laying out a street. *Butler* v. *Rogers*, 9 N. J. Eq. (1 Stockt.) 487. As a rule, the court ought not to interfere in cases of nuisance where there are conflicting opinions whether the apprehended injury will ever be sustained. Id.

A court of equity will not entertain a suit to recover money held in trust, when the complainant has a remedy by an action for money had and received. *Crooker* v. *Rogers*, 58 Me. 339. The court is not always bound to act, although its decree in a given case might not be void for want of jurisdiction. *Scott* v. *Whitlow*, 20 Ill. 310.

Where the jurisdiction and aid of the court cannot be afforded without invading the rights of innocent parties, it will decline to interfere. *Johnson* v. *Hubbell*, 10 N. J. Eq. (2 Stockt.) 332. It will not, therefore, lend its aid against a *bona fide* purchaser for a valuable consideration without notice. *Behn* v. *Young*, 21 Ga. 207. If a surety on a bond pays the amount, although equity will substitute him to the creditor so as to give him the benefit of all the securities, yet it will not put him in the situation of a specialty creditor, so as, by substitution, to enable him to divide the fund with specialty creditors. *Laws* v. *Thompson*, 4 Jones, 104.

When there is no allegation of fraud, imposition, oppression or mistake, a court of equity will not declare a deed which is absolute on its face, to be a security for money, upon parol proof of an agreement to that effect. *Whitfield* v. *Cates*, 6 Jones' Eq. 136.

Although a court of equity will not in general entertain jurisdiction simply to give a construction to a deed, that being purely a legal question, yet when a case is properly in a court of equity under some of its known and acknowledged heads of jurisdiction, and a question of construction incidentally arises, the court will determine it. *Simmons* v. *Hendricks*, 8 Ired. Eq. 84. So, although a bill will not be entertained which merely seeks to recover the possession of land held adversely, yet the court will sometimes decree an adverse claimant to deliver possession to the rightful owner; but only when such relief is incidental to the main object of the bill, and when the power of the court has been called into action for some purpose that belongs to its legitimate jurisdiction. *Green* v. *Spring*, 43 Ill. 280.

A party buying with knowledge of an incumbrance will be held in equity to have waived any right to enjoin the collection of the purchase-money, or to abate from the price of the land the amount of the incumbrance. Equity will refuse relief out of the unpaid considera-

tion because it supposes that with such knowledge the vendee chose to rely upon the covenants; and he will be remitted to their legal effect. *Worthington* v. *Curd*, 22 Ark. 277.

As a general rule, a court of equity will not entertain a bill to set aside a will; courts of probate having power to give adequate relief. *Case of Broderick's Will*, 21 Wall. 503. In the absence of statutory regulations, a court of equity will not require a natural father to support his bastard child. *Simmons* v. *Bull*, 21 Ala. 501.

§ 8. **Enforcing penalties and forfeitures.** A court of equity will not take jurisdiction of a case for the purpose of enforcing a penalty or forfeiture, but will leave the party to his remedy at law. *Paxton* v. *Douglas*, 16 Ves. 239; 19 id. 225; *Copper Mining Co.* v. *Ormsby*, 47 Vt. 709; *Horsburg* v. *Baker*, 1 Peters, 232; *Watts* v. *Watts*, 11 Mo. 547; *Roberts* v. *Wilkinson*, 34 Mich. 138. As equity will not enforce a penalty or forfeiture, it will not aid in divesting an estate for the breach of a covenant on a condition subsequent. *Popham* v. *Bampfield*, 1 Vern. 83; *Warner* v. *Bennett*, 31 Conn. 468; *Livingston* v. *Tompkins*, 4 Johns. Ch. 431; *Michigan State Bank* v. *Hammond*, 1 Doug. 527. Where covenants run with the land, if the circumstances are hard, equity will not decree them in *specie*, even against those who are bound by them at law. 1 Fonb. Eq., ch. 5, § 5. Where a legacy is given on condition that the legatee does not dispute the testator's will, if there be good ground for litigating the will the legatee will not be held to have thereby forfeited his legacy. *Powell* v. *Morgan*, 2 Vern. 90.

Where a lessee is liable to a forfeiture, if he assign his lease without license, a bill of discovery filed against him, to ascertain whether he has made such an assignment, is demurrable; and the same is true of a bill for a discovery of waste committed by a tenant; and also of a bill seeking a discovery of a matter which will subject the defendant to the forfeiture or loss of an office. The same principle applies where a discovery called for may lead to the indictment of the defendant; no one being bound to furnish evidence or to accuse himself of crime. Story's Eq. Pl., § 580. It has, however, been held that a party may be compelled to make a discovery although it will subject him to the penalty of a bond given for the faithful discharge of his official duties. *Greer* v. *Weaver*, 1 Sim. 404.

Exceptions to the general rule that a demurrer will be sustained when it appears on the face of the bill that the object of it is to enforce a penalty or forfeiture, arise when the plaintiff is solely entitled to take advantage of the penalty or forfeiture, and he expressly waives it; or where the defendant waives all objection to a bill to enforce a

penalty or forfeiture; or where the defendant, by his conduct, in fraud of the plaintiff, deprives himself of the benefit of the objection. Story's Eq. Pl., § 521. Equity will sometimes enforce a covenant of forfeiture when this is essential to do justice. *Brown* v. *Vandergrift*, 80 Penn. St. 142, 148.

§ 9. **Relieving from penalties and forfeitures.** The jurisdiction of equity to relieve against penalties and forfeitures was exercised at an early period. The following instances may be mentioned: Relief against penalties in money bonds, where payment was prevented by some unforeseen event; trifling defaults irrespective of accident or any excuse; relief against the penalty of the bond, in the case of the forfeiture of a mortgaged estate, the money having been paid or tendered within a reasonable time; ordering old securities, on which no demand had been made for a great length of time, so that payment might be presumed, to be delivered up to be canceled. 1 Spence's Eq. 628, 631.

Formerly, relief from penalties and forfeitures for breaches of conditions and covenants could only be obtained in equity. Although there is now a remedy at law in very many instances, yet the original jurisdiction of equity still remains. Equity will relieve against a penalty, if the case admits of certain compensation; the foundation of the relief being that when penalties are designed only to secure money or damages really incurred, if the party obtains the money or damages, he gets all he expected or required. *Skinner* v. *Dayton*, 2 Johns. Ch. 526; *Thompson* v. *Whipple*, 5 R. I 144; *Hackett* v. *Alcock*, 1 Call. (Va.) 533; *Hagar* v. *Buck*, 44 Vt. 285; 8 Am. Rep. 368. The amount due, with interest, is compensation where the payment of money only is the condition to be performed. *Rogan* v. *Walker*, 1 Wis. 527.

It has been the invariable practice in equity to relieve against forfeitures arising from the breach of conditions subsequent where compensation can be made in damages for the failure of precise performance. *Walker* v. *Wheeler*, 2 Conn. 299; *Messersmith* v. *Messersmith*, 22 Mo. 369; *De Forest* v. *Bates*, 1 Edw. Ch. 394; *Hagar* v. *Buck*, 44 Vt. 285; 8 Am. Rep. 368. A court of equity will relieve against the forfeiture of a condition in a deed of land to pay certain mortgages thereon and save the grantor harmless from the payment of such mortgages, in case of accident, mistake, fraud, or surprise, unless the grantee has been guilty of laches. *Hancock* v. *Carlton*, 6 Gray, 39. And a forfeiture will be relieved against in equity where A and B join in the purchase of land under an agreement that if B does not pay the whole of his share of the purchase-money, and A pays it, A shall have the

whole land upon payment back to B what he has paid. *Asher* v. *Pendleton*, 6 Gratt. 628.

In cases of liquidated damages, courts of equity will not interfere, unless the damages are grossly disproportioned to the injury; and they will decline to grant relief where a penalty or forfeiture is imposed by statute for the doing or failure to do a certain act. Where there is a forfeiture, relief is not always given, notwithstanding compensation can be made. See *Powell* v. *Redfield*, 4 Blatchf. (C. C.) 45; *Reynolds* v. *Pitt*, 19 Ves. 140; *Green* v. *Bridges*, 4 Sim. 96. If it be stipulated in a mortgage that there shall be paid a certain rate of interest, and in case it is not paid at the time agreed, it shall be increased, it seems the additional interest is in the nature of a penalty, and may be relieved against in equity. *Parker* v. *Butcher*, L. R., 3 Eq. 762, 767. But if the larger rate be originally fixed, with an agreement that it shall be reduced in case payment is promptly made, the condition for such prompt payment is part of the contract, and relief cannot be given upon failure to fulfill. *Nicholls* v. *Maynard*, 3 Atk. 519 Where a promissory note stipulates for a certain rate of interest, if the note is paid at maturity, but also provides for an increased rate of interest, after maturity, if such note is not paid when due, a court of equity will not relieve the maker from the payment of the higher rate when the note was not paid when due. *Downey* v. *Beach*, 78 Ill. 53; *Capen* v. *Crowell*, 66 Me. 282; *Hubbard* v. *Callahan*, 42 Conn. 524; 19 Am. Rep. 564; *Herbert* v. *Salisbury, etc., R. R. Co.*, L. R., 2 Eq 221. So where a mortgage contains a condition that if the interest is not paid when due, or within a limited time thereafter, the whole amount of the mortgage shall become due, a court of equity cannot relieve the mortgagor from the consequences of his omission to pay as stipulated. *Ferris* v. *Ferris*, 28 Barb. 29; *Reubens* v. *Prindle*, 44 id. 336; *Voorhies* v. *Murphy*, 26 N. J. Eq. 434; *Sterne* v. *Beck*, 1 De G. J. & S. 595.

§ 10. **When concurrent with courts of law** The concurrent jurisdiction of equity arises either where courts of law are unable to give an adequate remedy, or where, under the circumstances of the case, they cannot afford any relief. At the head of these equities are accident, mistake, and fraud.

The concurrent jurisdiction of equity in cases of accident was originally exercised under the name of cases of extremity; and it is said to have been coeval with the existence of the court. 1 Rolle's Abr. 374. By accident is meant such unforeseen events, losses, acts or omissions as are not caused by the negligence or misconduct of the party. "Many accidents are supplied in a court of law; as loss of deeds, mistakes in

receipts or accounts, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies; and many cannot be relieved even in a court of equity." 3 Bl. Com. 431. Where, however, an adequate remedy cannot be afforded at law, and the injured person is without fault and has a conscientious title to relief, not opposed by another's equal equity, a court of equity will relieve against the consequences of accident, when it can do so without derogating from any positive agreement. See Vol. 1, 160–172.

A frequent ground of equitable relief in case of accident is the loss of a bond or other instrument, where the party has no remedy, or an insufficient remedy at law. *Shields* v. *Com.*, 4 Rand. 541; *Tindall* v. *Childress*, 2 Stew. & Port. 250; *Irwin* v. *Planters' Bank*, 1 Humph. 145; *Chancy* v. *Baldwin*, 1 Jones (N. C.), 78. If anagreement containing mutual covenants be lost, the party injured thereby may apply to a court of equity for relief. *Bolware* v. *Bolware*, 1 Litt. 124. Where a deed of land executed and delivered, but not recorded, is lost, a court of equity will restrain the heirs and legal representatives of the grantor from selling the land, and establish the title of the grantee and his heirs. *Wright* v. *Christy*, 39 Mo. 125.

A court of equity will not only require the plaintiff to swear to an affidavit of the loss of an instrument, but to give to the plaintiff suitable indemnity (*Chewing* v. *Singleton*, 2 Hill's S. C. Ch. 371; *Leroy* v. *Veeder*, 1 Johns. Cas. 417); though a bill for discovery merely does not require such an affidavit. Mitf. Eq. Pl. 54. A bill to recover the amount of a lost note must offer to give such indemnity as may be required. *Smith* v. *Walker*, 1 Smedes & Marsh. Ch. 432; Vol. 1, 165–167.

A party cannot resort to a court of equity solely on the ground that the record has been lost or destroyed, and that parol evidence alone remains to establish the debt; but if he offer in his bill a bond of indemnity to the defendant against the lost record, and the damages and expenses of another suit, he will thereby entitle himself to equitable relief. *Davies* v. *Pettit*, 11 Ark. (6 Eng.) 349.

Although courts of law have now power in many instances to require indemnity, yet the remedy in equity is often more perfect; as equity can protect the defendant against a contingent liability which may arise from the subsequent finding of the instrument and a claim under it by a third party. The superiority of the equitable over the legal relief in the case of a lost instrument is further shown from the fact that a court of equity may order a re-execution of the instrument; and when a deed has been destroyed or concealed by the defendant, it will decree that the plaintiff shall hold the land until the defendant produce

the deed or admit its destruction; and if the plaintiff is out of possession it may even decree possession to him. Where rent has been received by the plaintiff for land which he has been in possession of for a long time, but the evidence of the plaintiff's title is lost, or the precise land out of which the rent is payable cannot be ascertained, equity will regard the presumption arising from possession as equivalent to proof of legal right, and will enforce payment. *Steward* v. *Bridger*, 2 Vern. 516; *Holder* v. *Chambury*, 3 P. Wms. 256; *Duke of Leeds* v. *Powell*, 1 Ves. 171; *Duke of Leeds* v. *New Radnor*, 2 Bro. C. C. 338, 518.

When executors or administrators, having reasonable ground to suppose that the assets are sufficient, have, without negligence or misconduct, paid debts and legacies, and it afterward unexpectedly appears that there is a deficiency of assets, a court of equity will protect them from loss. And where an executor, having collected a sum from a supposed debtor of the estate, pays it to a creditor, and it is subsequently ascertained that the sum so collected had been previously paid, the money may be recovered back in equity. *Pooley* v. *Ray*, 1 P. Wms. 355. So, a court of equity will compel the executor and creditors to refund the amount of a judgment which has been reversed. Id. And legatees who have been paid in full, to do the same in favor of unpaid legatees or creditors, when there is a deficiency of assets. *Orr* v. *Kaines*, 2 Ves. 194; *Noel* v. *Robinson*, 1 Vern. 94.

In case of the accidental defective execution of a power, where there are no opposing equities, a court of equity will afford relief in favor of purchasers, creditors, near relatives, or a charity; but not in favor of the donee of the power, a husband, remote relatives, or strangers; and the non-execution of a power through accident will not be relieved. 1 Story on Eq., §§ 94, 95.

A party will not be entitled to relief in equity against the positive obligations of a contract which he has accidentally failed to perform (Vol. 1, 171, 172); nor to redress, on the ground that he has been prevented by accident from obtaining the full benefit of a contract. A court of equity will not interfere on account of accident against a party who has an equal or superior equity; nor in favor of a party where the accident is the result of his own fault.

Mistake, as contra-distinguished from accident, is where a person, acting under an erroneous conviction either of law or fact, executes some instrument, or does some act which, but for the erroneous conviction, he would not have executed or done. Hayne on Eq. 132.

It may be laid down as a general proposition that ignorance of law will not affect agreements, or excuse from the legal consequences of

particular acts, even in courts of equity; it being deemed culpable negligence in a party who is acquainted with all the facts to do an act, and then set up in defense his ignorance of the law. 1 Fonb. Eq., B. 1, ch. 2, § 7, note *v*; *Pullen* v. *Ready*, 2 Atk. 591; *Leavitt* v. *Palmer*, 3 N. Y. (3 Comst.) 19; *Larkins* v. *Biddle*, 21 Ala. 252; Vol. 1, 84, 85. But a party is not presumed to have knowledge of foreign law. *Haven* v. *Foster*, 9 Pick. 113; *Kenny* v. *Clarkson*, 1 Johns. 385; Vol. 1, 85. And relief will sometimes be granted in case of a mistake of the law when it can be done without impugning the rights of those who were not aware of the existence of such mistake when their rights accrued. *Hall* v. *Reed*, 2 Barb. Ch. 500.

If an instrument by mistake of its author or his draftsman, either in fact or law, does not speak his mind, a court of equity will modify the instrument so as to make it do so. *Ward* v. *Allen*, 28 Ga. 74; *Carter* v. *Barnes*, 26 Ill. 454. And where the mistake of law is accompanied by circumstances of misrepresentation, imposition, or mental imbecility, equity will grant relief. *Naylor* v. *Winch*, 1 Sim. & Stu. 555. Such circumstances may be presumed where the principles of law are plain, well established, and of constant occurrence. A deed executed without professional advice in mistake of title, by a person who is grossly ignorant, and habitually intoxicated, will not be enforced in equity. *Dunnage* v. *White*, 1 Swanst. 137. A contract entered into through mistake of law, accompanied with surprise, especially if the surprise be mutual, renders the contract invalid; and an agreement containing a defective execution of the intent of the parties, from ignorance of the law as to the proper mode of framing the instrument, will be upheld in equity. *Acton* v. *Peirce*, 2 Vern. 480. Where a party has acted in ignorance of his title upon a mistake of law, a court of equity will not grant him relief against a *bona fide* purchaser for a valuable considera tion without notice, the latter having an equal right to protection with the former. *Ligon* v. *Rogers*, 12 Ga. 292.

Although ignorance of a particular fact may be a ground of relief even at law, yet every kind of mistake is not relievable in equity. If a party labors under a mistake of fact, and executes a contract with a clear understanding of its provisions, he cannot ask to be relieved from its requirements, or seek to vary its terms, because he did not suppose that the language employed really meant what its terms import. *Kent* v. *Manchester*, 29 Barb. 595. A court of equity has no power to alter or reform an agreement made between the parties, since this would be in fact the making of a contract for them; but merely to correct the writing executed as evidence of the agreement, so as to make it express what the parties really intended. *Liman* v. *Providence, etc., R. R.*

Co., 5 R. I. 130; *N. Y. Ice Co.* v. *North Western Ins. Co.*, 31 Barb. 72. The power of a court of equity to reform contracts will be exercised sparingly, and with great caution, and only upon the clearest proof of the intention of the parties, and of the mistake or accident upon which its interposition is invoked (*Reese* v. *Wyman*, 9 Ga. 430; *Cleary* v. *Babcock*, 41 Ill. 271; *Linn* v. *Barkey*, 7 Ind. 69; *Gillespie* v. *Moon*, 2 Johns. Ch. 585; *Mansfield & Sandusky City R. R. Co.* v. *Veeder*, 17 Ohio, 385; *Shively* v. *Welch*, 2 Oregon, 288; *Bailey* v. *Bailey*, 8 Humph. 230; *Lake* v. *Meacham*, 13 Wis. 355; *Fowler* v. *Adams*, id. 458; *Mosby* v. *Wall*, 23 Miss. 81; *Hall* v. *Clagett*, 2 Md. Ch. 151); the presumption being always in favor of the writing. *Davidson* v. *Greer*, 3 Sneed, 384; *Tesson* v. *Atlantic Mut. Ins. Co.*, 40 Mo. 33; *Cromwell* v. *Winchester*, 2 Head, 389. If the fact was from its nature doubtful, or at the time of the agreement equally unknown to both parties; or if there has been a long acquiescence in the mistake, and neither party was aware of it, a court of equity will not interfere. *Smith* v. *Evans*, 6 Binn. 102; *Jones* v. *Carter*, 4 Hen. & Munf. 184; *Livingston* v. *Barringer*, 15 Johns. 471. Equity will not avoid an agreement entered into to prevent family disputes, though founded on mistake; nor an agreement entered into to save the honor of the family. *Frank* v. *Frank*, 1 Ch. Cas. 84; *Stapleton* v. *Stapilton*, 1 Atk. 10. A deed of gift will not be reformed, where the only witness to an alleged mistake in the deed is the donor, and his testimony is confused and contradictory. *Lockhart* v. *Cameron*, 29 Ala. 355.

Ignorance of a material fact, at the time of doing an act or making a contract, will in general be ground for relief in equity, not only when there has been a suppression or concealment of facts by one of the parties amounting to fraud, but also in case of ignorance and mistake by both parties, and where the fact, although previously known, had been forgotten. *Bingham* v. *Bingham*, 1 Ves. 126; *Hore* v. *Becher*, 12 Simons, 465; *Calverley* v. *Williams*, 1 Ves. Jr. 210; *Allen* v. *Hammond*, 11 Peters, 71; *Wemple* v. *Stewart*, 22 Barb. 154; Vol. 1, 84, 85. When the fact is known to one of the parties and not known to the other, but the former is under no obligation to communicate it, a court of equity will not correct the contract. *Fox* v. *Mackreth*, 2 Bro. Ch. 420; *Brown* v. *Pring*, 1 Ves. 408; *Laidlaw* v. *Organ*, 2 Wheat. 178.

Equity will give effect to the real intention of the parties as gathered from the objects of the instrument and the circumstances of the case, if the manifest intent and object of the parties be clearly discernible on the face of the instrument. The cases are numerous where this principle has been applied to the execution of deeds and powers. *Nixon* v. *Carco*, 28 Miss. 414. Although a written instrument is presumed to

express the full and correct intent of the parties, yet if it be established by satisfactory proof, or be fairly implied from the nature of the transaction, that it contains less or more than the parties intended, or varies substantially from their intent, equity will reform the instrument, or will set it aside or modify it, upon the application of one of the parties, if it would be unjust for the other party to enforce it. *O'Neil* v. *Teague*, 8 Ala. 345; *Bradford* v. *The Union Bank*, 13 How. (U. S.) 66; *Wooden* v. *Haviland*, 18 Conn. 101. And where an instrument has been delivered up to be canceled in ignorance of the material facts, a court of equity will grant relief as between the original parties, or those claiming under them in privity. *East India Co.* v. *Donald*, 9 Ves. 275; *Scholefield* v. *Templer*, Johnson, 155; 5 Jur. (N. S.) 619; 4 DeG. & J. 429. Where a party agreed to certain memoranda as the basis of a contract to be executed, some of which were omitted from the contract, and the complainant had no opportunity to examine the contract, and did not understand it, it was held that a court of equity would afford relief by reforming the contract. *Metropolitan Bank* v. *Godfrey*, 23 Ill. 579.

It is not material whether the instrument is an executory or an executed agreement; nor whether the proceeding is directly by bill to correct the mistake, or the mistake is set up in the answer by way of defense. *Leitensdorfer* v. *Delphy*, 15 Mo. 160. A mistake in a deed or other written contract, whether the mistake arose from fraud or a mistake of fact, may be corrected by parol when clearly shown to exist. *Busby* v. *Littlefield*, 31 N. H. (11 Fost.) 193; *Smith* v. *Jordan*, 13 Minn. 264; *Hunter* v. *Bilyeu*, 30 Ill. 228; *McKay* v. *Simpson*, 6 Ired. Eq. 452. A defective description in a deed of public lands may be reformed by reference to the government records, or by the patent. *Worden* v. *Williams* 24 Ill. 67.

A court of equity will entertain a bill to correct a mistake or omission in a deed, although the complainant might have explained the omission and fixed the locality of the land by parol proof in an action at law; he not being obliged to do so, but having a right to resort to equity in the first instance, so as to remove any cloud or difficulty which might surround his title. *Roberts* v. *Taliaferro*, 7 Iowa, 110. But equity will not impart vitality and force to a defective contract where, by doing so, other persons having a prior equity will be injuriously affected. *Lucas* v. *Barrett*, 1 Greene, 510. A court of equity will correct the execution, or attempt at execution, of a mere power; but it will not supply the execution where none has been attempted. 1 Fonb. Eq., B. 1, ch. 1, § 7; *Tollet* v. *Tollet*, 2 P. Wms. 490.

Although at common law fraud vitiates all transactions, and there

are many remedies at law for redressing injuries sustained through fraud, yet the relief afforded by the common-law actions in cases of fraud is often wholly inadequate. Courts of equity, by their power of discovery and of compelling defendants to answer on oath, have probably exercised their authority more beneficially over fraud than over any other branch of equitable jurisdiction. Moreover, while positive evidence of fraud is not indispensable, either at law or in equity, the latter will act on a lower degree of proof than would be required at law, and will consider that a fraud which at law would not be so regarded. *Chesterfield* v. *Janssen*, 2 Ves. 155; *Warner* v. *Daniels*, 1 Woodb. & M. 103.

As courts of equity only attempt to redress wrongs, and not to punish the perpetrators, where a misrepresentation is in an immaterial matter, or occasions no injury, or where the party injured does not act upon the misrepresentation, but upon something else, equity will not relieve. *Atwood* v. *Small*, 6 Cl. & Fin. 232, 237. Neither will it do so when the misrepresentation is relative to questions of fact, or matters of opinion equally open to the inquiry of both parties, and in which neither can be supposed to have trusted the other. *Coil* v. *Pittsburgh Fem. Col.*, 40 Penn. St. 445; *Pike* v. *Fay*, 101 Mass. 134. But where the misrepresentation is relative to a material fact, and operates as an imposition upon the other party, it is immaterial whether the party making it knew it was false (*Wright* v. *Snowe*, 2 De G. & Sm. 321; *Sharp* v. *Mayor of N. Y.*, 40 Barb. 256; *Twitchell* v. *Bridge*, 42 Vt. 68; *Thompson* v. *Lee*, 31 Ala. 292); and where the principal avails himself of a misrepresentation made by his agent, he will be held fully implicated. Vol. 1, 139; *Fitzsimmons* v. *Joslin*, 21 Vt. 129, 140–142.

Fraud may be committed by concealment or suppression of the truth; as, if a person conceal facts which he is under a legal or equitable obligation to communicate. Strictly speaking, a party ought to communicate to the other his knowledge of all material matters or facts not discoverable by the other, and of which he knows the other is ignorant. But as so extensive a rule could not be enforced without encouraging inattention and negligence, equity applies to many cases the maxim *caveat emptor*, and holds the purchaser bound. unless there is misrepresentation or artifice on the part of the vendor, or a warranty of the article sold. But a court of equity will relieve when a person withholds a material fact which the other could not have discovered with ordinary care, notwithstanding such fact may be extrinsic to the subject matter of the contract, and only incidentally connected with it at the time. See *post*, title *Fraud; Evans* v. *Bicknell*, 6 Ves. 173.

Although mere inadequacy of consideration does not of itself constitute fraud, yet, when it is accompanied with other circumstances showing imposition or undue influence, or when the inadequacy is so gross as to shock the conscience, equity will grant relief. *Gwynne* v. *Heaton*, 1 Bro. C. C. 8; *Osgood* v. *Franklin*, 2 Johns. Ch. 1; *Barnett* v. *Spratt*, 4 Ired. Eq. 171.

Fraud may consist in the suppression or destruction of deeds, wills, or other instruments, upon due proof of which equity will grant relief; and where the execution of a deed of land has been obtained by fraud a court of equity will direct the deed to be given up to the grantor, or order it to be canceled, and at the same time compel the grantor to pay back the purchase-money with interest. See *Fraud; Rescission.*

In case of a contract with an infant, idiot or lunatic, whenever, from the nature of the transaction, there is an absence of entire good faith, or it is not seen to be just in itself, or for the benefit of such person, equity will interfere on the ground of fraud, and either set it aside or so modify it as to make it subservient to his just rights and interests (1 Fonb. Eq., B. 1, ch. 2, §§ 2, 4; *Howe* v. *Howe*, 99 Mass. 88); and a contract which is for the benefit of such persons will be upheld, both at law and in equity. *Seaver* v. *Phelps*, 11 Pick. 304; *McCrillis* v. *Bartlett*, 8 N. H. 569; *Hallett* v. *Oakes*, 1 Cush. 296. So, likewise, equity regards the contracts of persons of weak understanding with suspicion, and will deem such contracts void whenever there has been imposition, artifice or undue influence. This remark applies to the contracts of persons who at the time of the transaction were grossly intoxicated, especially if unfair advantage was taken, or if there was contrivance to cause the intoxication. Vol. 1, 671, 677; *Breckenridge* v. *Ormsby*, 1 J. J. Marsh. 239; *Allis* v. *Billings*, 6 Metc. 415; *Clarkson* v. *Hanway*, 2 P. Wms. 203; *Bennet* v. *Vade*, 2 Atk. 324; *Hotchkiss* v. *Fortson*, 7 Yerg. 67; *Harvey* v. *Pecks*, 1 Munf. 519; *White* v. *Cox*, 3 Hayw. 82; *Campbell* v. *Keatcham*, 1 Bibb, 406.

Where a person has a reasonable confidence reposed in him, or possesses a peculiar influence over another with whom he enters into a transaction, equity watches the transaction jealously, and will set it aside if the person in the fiduciary position has taken an improper advantage. This rule applies to guardians, trustees, executors, and administrators, persons standing in the relation of *quasi* guardians or confidential advisers, solicitors and attorneys, physicians, clergymen, and agents in transactions with their principals. Equity, moreover, requires entire good faith between debtor, creditor, and surety. Therefore, if a creditor does any thing affecting the surety, or omits doing any act or duty when required by the surety, the latter may set up such conduct

as a defense to any proceedings brought against him in equity. *People* v. *Jansen*, 7 Johns. 332; *Denison* v. *Gibson*, 24 Mich. 186; *Cox* v. *Tyson*, 1 Turn. & Russ. 395.

When parties on account of their peculiar situation are likely to be imposed upon or taken advantage of, equity will often afford relief on the ground of constructive fraud, even in cases where the transaction, if entered into by parties differently situated, would not have been questioned. This is true of dealings and transactions of expectant heirs, remaindermen, and reversioners whenever any inequality appears, or any undue advantage has been taken. Common sailors, by reason of their improvidence, generosity, and credulity, are protected by the court, and their contracts, respecting their prize money and wages, relieved against, under similar circumstances. See *Davis* v. *Duke of Marlborough*. 2 Swanst. 147; *How* v. *Weldon*, 2 Ves. Sen. 516. The *Juliana* 2 Hagg. Adm. 504

Equity will protect a person who is not a free agent, and who is unable to protect himself. It will, therefore, relieve against acts done under duress. *Evans* v. *Llewellin*, 1 Cox, 333–340; *Crowe* v. *Ballard*, 1Ves. Jr. 215. And with respect to the acts of persons laboring under extreme necessity, relief will be given if a fraudulent advan tage has been taken. *French* v. *Shoemaker*, 14 Wall. 314; Vol. 1, 85.

The court will not allow the statute of frauds to be interposed in support of fraud. Where, therefore, from the fraudulent nature of the transaction, a contract has not been reduced to writing as it ought to have been, it will nevertheless be enforced against him who is guilty of the fraud, and he will not be permitted to set up the statute. *Att.-Gen.* v. *Sitwell*, 1 Y. & Coll. 583; *Warden* v. *Jones*, 2 DeG. & J. 76.

The jurisdiction of equity in matters of account is an instance of relief where although the law affords a remedy, yet the attainment of redress at law is difficult, or attended with doubt as to whether justice will be done. It should, however, be observed that account in some form enters more or less into almost every head of equity jurisdiction, in matters of trust, in matters of administration, in suits for foreclosure or redemption, and in many other cases in which equitable titles are to be protected, and equitable rights enforced. Where there are circumstances of special complication, courts of equity constantly assume jurisdiction by taking cognizance of matters which, though cognizable at law, are yet so involved in an intricate account that they properly become subjects of equitable relief. *Mackenzie* v. *Johnston*, 4 Madd. 374; *Massey* v. *Banner*, id. 416; *Phillips* v. *Phillips*, 9 Hare, 473; Vol. 1, 174, 175.

When an account has been settled by the parties, and a balance struck, the remedy at law being adequate, there is in general no occasion for the interposition of equity. But in case of omission, mistake, accident, or any undue advantage affecting the account, whereby a wrong balance is fixed, equity will afford relief, either by ordering the account to be opened, or the court will allow the account to stand, and give liberty to surcharge and falsify, or open it as to certain items. *Matthews* v. *Wallwyn*, 4 Ves. 125; *Vernon* v. *Vawdry*, 2 Atk. 119; *Barrow* v. *Rhinelander*, 1 Johns. Ch. 550; *Consequa* v. *Fanning*, 3 id. 587; *Slee* v. *Bloom*, 5 id. 366; *Perkins* v. *Hart*, 11 Wheat. 237; *Bankhead* v. *Alloway*, 6 Cold. 56; Vol. 1, 175. The showing of an omission for which credit ought to have been given is a *surcharge*, and the proving of an item wrongly inserted in discharge, a *falsification*. The party who has the liberty of surcharging or falsifying may object to errors both of fact and of law, and he has the burthen of proof. An account which has been settled will rarely be opened excepting in a clear case of fraud, but only liberty given to surcharge and falsify. Where, however, the account is between persons sustaining a fiduciary relation, equity will open the account on slight evidence of fraud. See *Perkins* v. *Hart*, 11 Wheat, 237; *Drew* v. *Power*, 1 Sch. & Lefr. 192; *Wier* v. *Tucker*, L. R., 14 Eq. 25.

Equity will assume jurisdiction in matters of account in favor of a principal against his agent; but not, as a rule, in favor of the agent against the principal. The facts being in general exclusively within the knowledge of the agent, the principal usually requires discovery; and the fiduciary relation between the parties is a distinct ground of jurisdiction in equity. Vol. 1, 178, 179. With the agent, it is otherwise. Id. He reposes no special confidence in the principal, and commonly has all the knowledge requisite to support his rights. When, however, the accounts are mutual or complicated, or the nature of the employment is such that the agent has confided in the principal to keep the account, a bill in equity may be maintained by the agent. *McKenzie* v. *Johnston*, 4 Madd. 373; *Wilson* v. *Mallett*, 4 Sandf. 112; Vol. 1, 179.

Courts of law could not, until specially authorized by statute, adjudicate upon a distinct adverse claim so as to give the party the advantage of it by way of set-off; and this being the most convenient course, the court of chancery entertained jurisdiction to adjust mutual claims between the parties, where at law they would have been the subject of a cross action. Since the general introduction of the right of set-off by statute, the interposition of a court of equity in such a case is seldom required. Where, however, a right of set-off exists which cannot be

enforced at law, a court of equity will afford relief; as in the case of a legal debt on one side, and an equitable debt on the other, and a mutual credit between the parties touching such debts. It seems that equity, under its general jurisdiction, can relieve in all cases, where although there are mutual and independent debts, yet there was a mutual credit. But equity following the law will not permit a set off of debts due in different rights; as a joint debt to be set off against a separate debt, or the converse, unless a joint credit was given on account of the separate debt, or there are other special circumstances. See *Green* v. *Darling*, 5 Mas. (C. C.) 207; *Field* v. *Oliver*, 43 Mo. 200; *Wallenstein* v. *Selizman*, 7 Bush (Ky.), 175.

An important instance of the relief afforded in equity to enforce obligations arising out of certain relations which parties sustain toward each other, on principles of natural justice, is the exercise of jurisdiction to enforce contribution where one of several who are liable to a common burden discharges the same for the benefit of all.

Contribution between sureties depends more upon a principle of equity than upon contract. But the equitable doctrine in progress of time became so well established that parties were presumed to enter into contracts of suretyship upon its knowledge, and consequently upon a mutual understanding that if the principal failed, each would be bound to share with the others a proportionate loss. Vol. 1, 182–186. Courts of common law thereupon assumed jurisdiction. This jurisdiction of the common-law courts does not, however, impair the concurrent jurisdiction of equity. In many cases, especially when the sureties are numerous, and some of them insolvent, or where some of the sureties have died, courts of equity are alone adequate to afford a perfect remedy. At law, when there are several, each is only liable to contribute for his own portion, notwithstanding others are unable to contribute any thing; and there must be separate actions and verdicts against each. In equity, contribution can be obtained from all, and if any cannot contribute, the amount will be equally apportioned among those who can, unless some are liable for a larger proportion than the others; and where a party primarily liable has a right over against another, the latter can frequently be reached in the same suit. Roberts' Princ. of Eq. 184, 185; *Deering* v. *Earl of Winchelsea*, 2 Bos. & Pul. 270; *Cowell* v. *Edwards*, id. 268; *Chapman* v. *Morrill*, 20 Cal. 130; Vol. 1, 182–186.

Where a surety is compelled to pay the debt for which all are bound, he can make his co-sureties contribute whether they are jointly and severally, or only jointly or severally liable, and whether their suretyship arises under the same or a different instrument, if such instru-

ments are primary concurrent securities for the same debt; unless there is an agreement to the contrary. *Dering* v. *Earl of Winchelsea*, 1 Cox, 318; *Bell* v. *Jasper*, 2 Ired. Eq. 597; *Armitage* v. *Pulver*, 37 N. Y. (10 Tiff.) 494.

The doctrine of contribution applies equally between those who are original contractors; that is, between those who are jointly bound on their own account (not being copartners), as it does between those who are co-sureties. Thus, if a note were given for the cost of a partition wall, by the owners of the adjoining premises between which the wall was constructed, and one of the parties should pay the entire amount of the note, or more than his share, he could claim a contribution from the other. *Campbell* v. *Mesier*, 4 Johns. Ch. 334; *Gearhart* v. *Dixon*, 1 Penn. St. 224; Vol. 1, 182–186. When legatees have been paid more than their proportion before all the debts have been ascertained, they may be compelled, in case of a deficiency of assets, to refund and contribute in favor of the unpaid debts. And if a partner has been compelled to pay more than his share, he is entitled, upon a dissolution and winding up of the business, to contribution against the other partners for such balance as appears in his favor. Jeremy's Eq. Jur. 364; *ante*, Vol. 2, 300. Where the recovery of a fund is sought in which the several claimants have a separate and unascertained interest depending upon a *pro rata* distribution of the fund upon an account to be taken, a court of equity will entertain jurisdiction. And the same is true of the case of several defendants whose liability is separate, but who are jointly responsible for the whole fund, but the amount of whose separate liability can only be ascertained by a discovery from them. *Gay* v. *Edwards*, 30 Miss. 218. If several persons become possessed by purchase, descent, or otherwise, of different parts or interests in an estate, which is charged with a judgment, mortgage, lien, or other incumbrance, each will be obliged to contribute proportionably, in keeping down the interest, or paying off the incumbrance; and if one is compelled to pay the creditor the whole amount, he can call upon the others for contribution. *Williams* v. *Craig*, 2 Edw. Ch. 297; *Aiken* v. *Gale*, 37 N. H. 501; *Cheesebrough* v. *Millard*, 1 Johns. Ch. 409; *Stevens* v. *Cooper*, id. 425; Vol. 1, 182–186.

Contribution also frequently arises between joint tenants, tenants in common, and part owners of ships and other chattels, for losses incurred for the general benefit; and an apportionment also occurs, where profits have been made. Vol. 1, 183; Vol. 2, 301.

General average in maritime law is a contribution by parties in interest toward a loss or expense voluntarily incurred for the benefit of all; as where the cargo is thrown overboard, or given for ransom, or sold

through necessity, or the rigging cut away to save the vessel, or the ship stranded to shield her from impending danger. Abbott on Shipping, ch. 8, § 1. The principle is not, however, confined to cases of jettison, but is applied to other losses and expenditures for the common benefit. Although the party seeking contribution may enforce his right in an action at law, yet, as it is difficult for a court of law to apportion and adjust the amount to be paid to each, resort is usually had to a court of equity which has power to bring all the parties before it, and to adjust the whole apportionment at once. *Hallett* v. *Bousfield*, 18 Ves. 190, 196; *Merithew* v. *Sampson*, 4 Allen, 192; 1 Story's Eq. Jur., §§ 490, 491.

Courts of equity exercise jurisdiction concurrently with other tribunals, over executors and administrators, to compel the due administration of the personal estates of deceased persons in behalf of those who have a beneficial interest in the estate; the ground of such jurisdiction being the execution of a trust, or the necessity for an account and discovery. 3 Bl. Com. 98; 1 Spence's Eq. 578; *Spotswood* v. *Dandridge*, 4 Munf. 289; *Hagan* v. *Walker*, 14 How. (U. S.) 29; *Green* v. *Creighton*, 23 id. 90; *Pharis* v. *Leachman*, 20 Ala. 662. Sometimes the executor finds that he cannot safely administer the estate without the direction of a court of equity; as where there are equitable as well as legal assets, or where the assets are required to be marshaled. The suit may be instituted by the executor or administrator against the creditors for an adjustment of their claims, and a decree settling the order and payment of the assets; or the bill may be filed by a creditor or legatee for the payment of his own debt or legacy, or by one or more of the creditors or legatees on behalf of all. *Clark* v. *Hogle*, 52 Ill. 427; *Thompson* v. *Brown*, 4 Johns. Ch. 619, 630–643; *Kerr* v. *Blodgett*, 48 N. Y. (3 Sick.) 62; *post*, title *Executors and Administrators*.

In this country, suits in equity for the administration of the estates of decedents are seldom resorted to; the distribution of such assets having been, in most of the States, committed by statute, to special tribunals. Cases, however, occur in which a court of equity can alone afford adequate relief; and in a few of the States, courts of equity are expressly authorized to take cognizance of administration suits.

The jurisdiction of equity in setting out dower is exercised for the reason that by the course of proceedings in equity the widow is enabled to ascertain to what estates of her husband her right of dower attaches, and their comparative value, and to have an account taken of the rents and profits; and to have all other preliminaries to a fair assignment of her dower determined. A fraudulent conveyance may have to be set

aside; or a partition, an account, or a discovery be necessary; or the lands may be held by various purchasers, or the right be affected with conflicting equities; making a resort to a court of equity indispensable. *Swaine* v. *Perine*, 5 Johns. Ch. 482; *Badgley* v. *Bruce*, 4 Paige's Ch. 98; *Herbert* v. *Wren*, 7 Cranch, 370.

It has been questioned whether a court of equity can give relief when there is no obstacle to the widow's legal remedy. *Harrison* v. *Eldridge*, 2 Halst. 392. The weight of authority is, however, in favor of the concurrent jurisdiction of courts of equity with courts of law, in the assignment of dower in all cases. *Blain* v. *Harrison*, 11 Ill. 388; *Ringhouse* v. *Keever*, 49 Ill. 470; *Brooks* v. *Woods*, 40 Ala. 538; *Palmer* v. *Casperson*, 2 C. E. Green, 204; Story's Eq. Jur., § 624. The jurisdiction of equity is exclusive when dower is claimed out of an equitable estate. *Farwell* v. *Cotting*, 8 Allen, 211; *McMahan* v. *Kimball*, 3 Blackf. 1.

Where land is bought subject to a mortgage, the land is the primary fund for the payment of the mortgage debt, and the widow of the purchaser cannot have the incumbrance discharged out of the personal estate. But she may go into a court of equity to have the land sold, the mortgage discharged, and her right of dower in the surplus secured to her. *Daniel* v. *Leitch*, 13 Gratt. 195; *Thompson* v. *Cochran*, 7 Humph. 72. So likewise, a widow is entitled to a proper allowance out of the proceeds of the sales of partnership lands as an equivalent for her dower, if the partnership was solvent at the period of its dissolution; and the court will determine what this proportion shall be; and whether she is not entitled to rents and profits from the death of her husband until the sale of the property. *Goodburn* v. *Stevens*, 1 Md. Ch. 420.

The doctrine of marshaling assets and securities is analogous to contribution. Vol. 1, 348–354. Where parties, whose legal rights being confined to one fund, would fail to obtain satisfaction of their just claim if left to the course of law, equity interferes in order to afford complete justice by means of what is called the marshaling of assets which is such an arranging of the different funds under administration as that they may, as far as possible, without injustice, be applied in satisfaction of the various claims, notwithstanding certain parties have a right to prior satisfaction out of some one or more of such frauds. When, for instance, there are two or more funds and several claimants, some of whom can resort to all of such funds, and others can resort to one only, equity will either compel the former to claim against the fund which the latter cannot reach, or compensate the latter out of the fund in proportion to what the former has necessarily taken from that which

formed the only means of payment to the latter. *Cheesebrough* v. *Millard*, 1 Johns. Ch. 413; *Wiggin* v. *Dorr*, 3 Sumner, 410; *Bruner's Appeal*, 7 Watts & Serg. 269; *Hanneyan* v. *Hannah*, 7 Blackf. 353; Vol. 1, 352, 353.

Although the personal estate is the primary fund for the payment of debts, yet the testator may charge his real estate with the payment of them; and in such case the creditors may resort to a court of equity to obtain satisfaction out of the primary fund, notwithstanding they have a remedy at law against the personal estate. *Smith* v. *Wyckoff*, 11 Paige's Ch. 57. The estate descended to the heirs is to be used for the payment of debts, before the estate devised, unless the testator direct to the contrary; and equity will marshal the real assets descended to the heir in favor of specific legatees. *Livingston* v. *Livingston*, 3 Johns. Ch. 148; *Graham* v. *Dickinson*, 3 Barb. Ch. 169. Where the testator charges his real estate with the payment of his debts, and they are paid out of the personal estate, and the fund for the payment of legacies thereby exhausted, equity will marshal the assets in favor of the legatees, and place them in the situation of the creditors with respect to the real estate. *Clifton* v. *Burt*, 1 P. Wms. 155; *Haslewood* v. *Pope*, 3 id. 323.

The marshaling of securities frequently arises in the case of mortgages, where the securities are from the same common debtor. If A has a mortgage upon two different pieces of property, and B has a mortgage upon only one of them, B may compel A to take satisfaction out of one of them, when it will not prejudice A's right to do so. So where a judgment creditor is entitled to proceed against two funds of the debtor, and another judgment creditor can go upon only one of them, the former will be compelled to resort first to the fund which cannot be reached by the second judgment. *Ex parte Kendall*, 17 Ves. 520; *Dorr* v. *Shaw*, 4 Johns. Ch. 17; *N. Y. Ferry Co.* v. *N. J. Co.*, Hopk. Ch. 460; *Besley* v. *Lawrence*, 11 Paige's Ch. 581; *Hunt* v. *Townsend*, 4 Sandf. Ch. 510. It may even arise where two or more persons are under a joint obligation to one creditor, and one of them is indebted to another creditor, when it appears that the debt ought in reality to be paid by the one who is only jointly indebted, or there is some supervening equity. *King* v. *McVickar*, 3 Sandf. Ch. 192.

The concurrent jurisdiction of courts of equity in the partition of real property had its origin at a very early period; certainly as early as the reign of Queen Elizabeth. 1 Fonb. Eq., B. 1, ch. 1, § 3, note *f*. The common law of England afforded no remedy to the owners of undivided shares in land who were desirous of severing their interest except in the case of coparceners, for whose benefit there lay a

writ of partition; subsequently the power to compel partition was extended by statute to joint tenants and tenants in common. But the forms of the common law not being suited to the exercise of this jurisdiction, the court of chancery also assumed the jurisdiction, and as the latter court was found to afford superior facilities for the partition of estates, the proceeding by writ of partition at law was abolished. 1 Spence's Eq. 654. In this country the partition, of real property is, in nearly all of the States, the subject of statutory regulation. In some of them the jurisdiction is concurrently exercised at law and in equity. See 1 Washb. on Real Prop. 433; *Smith* v. *Smith*, 10 Paige's Ch. 470; *Hall* v. *Piddock*, 6 C. E. Green, 314; *Donnell* v. *Mateer*, 7 Ired. Eq. 94; *Green* v. *Putnam*, 1 Barb. 509.

Cases often occur involving complicated rights and equitable compensation, to which a court of law is wholly inadequate. A court of equity is not restrained as a court of law is, to a mere partition or allotment of the lands, but will adjust, by its decree, all the equitable rights of the parties interested in the premises. If improvements have been made by one of the parties, the court will decree compensation for equality of partition; and the court will assign to the respective parties such portions of the estate as will best accommodate them, and be of most value with reference to their situations in relation to the property previous to the partition. *Wilkin* v. *Wilkin*, 1 Johns. Ch. 116; *Phelps* v. *Green*, 3 id. 302; *Larkin* v. *Mann*, 2 Paige's Ch. 27; *Town* v. *Needham*, 3 id. 546; *Smith* v. *Smith*, 10 id. 470; *Warfield* v. *Warfield*, 5 Harr. & J. 459; *Cox* v. *McMullin*, 14 Gratt. 82.

The ascertaining and adjusting controverted boundaries was deemed at an early period a proper subject for the jurisdiction of a court of equity, but it has always been cautiously exercised. At the present day the jurisdiction is not favored, and will not be entertained unless upon some equitable ground, such as fraud, confusion arising from the negligence or misconduct of a party whose duty it is to preserve and protect the boundaries, or the prevention of a multiplicity of suits. *Rouse* v. *Barker*, 3 Bro. Ch. 180; *Miller* v. *Warmington*, 1 Jac. & Walk. 472; *Aston* v. *Lord Exeter*, 6 Ves. 293; *Wake* v. *Conyers*, 1 Eden, 331; *Haskell* v. *Allen*, 23 Me. 448; Vol. 1, 720. A court of equity will not interfere in a case of controverted boundaries if an action of ejectment will afford adequate relief. *Wetherbee* v. *Dunn*, 36 Cal. 249. And although there be no legal remedy it does not, therefore, follow that there must be an equitable remedy unless there is also an equitable right. *Stuart* v. *Coalter*, 4 Rand. 74; *Coggett* v. *Hart*, 5 Fla. 215. In a proper case for equitable interposition, the court will issue a commission to ascertain the boundaries, and at the same time, if neces-

sary, decree an account of rents and profits. *Willis* v. *Parkinson*, 2 Meriv. 506; *Norris* v. *Le Neve*, 3 Atk. 82; *Merriman* v. *Russell*, 2 Jones' Eq. 470. When it is not practicable to ascertain the boundaries, the court will assign reasonable boundaries, or set out lands of equal value. *Spear* v. *Crawter*, 2 Meriv. 418.

In case of the confusion of personal property, — as where an agent by fraud confounds his own goods with those of his principal, so that they cannot be distinguished, the whole will be treated in equity as belonging to the principal. *Lupton* v. *White*, 15 Ves. 432; *Hart* v. *Ten Eyck*, 2 Johns. Ch. 62; *Pratt* v. *Bryant*, 20 Vt. 333; Vol. 2, 240–242.

Persons standing in the relation of partners have various rights, most of which are recognized by courts of law. But it is otherwise as to some of these rights. The interposition of a court of equity may be called for to enforce the specific performance of an agreement in the articles of partnership, or to restrain its violation. *Marshall* v. *Colman*, 2 Jac. & Walk. 266; *Somerville* v. *Mackay*, 16 Ves. 382. An injunction may be called for during the continuance of the partnership, to prevent a misappropriation of partnership funds, or to prevent a partner from improperly signing or indorsing notes or doing other acts injurious to the firm. *Charlton* v. *Poulter*, 19 Ves. 148, note. A discovery may be required, in order to establish the partnership, or the terms of it, as where the written articles are suppressed or concealed, or where there are dormant partners the names and number of whom cannot otherwise be ascertained. A court of law cannot compel a dissolution of the partnership during the term for which it is stipulated, as this would constitute a rescission of the contract. But in equity, a dissolution may be decreed where it is impracticable to carry on the business of the firm, or where one of the partners has become insane or permanently incapacitated, or has been guilty of gross misconduct. *Waters* v. *Taylor*, 2 Ves. & B. 299; *Isler* v. *Baker*, 6 Humph. 85; *Berry* v. *Bross*, 3 Sandf. Ch. 1; *Miller* v. *Jones*, 39 Ill. 54; *Shulte* v. *Hoffman*, 18 Texas, 678; *Davis* v. *Lane*, 10 N. H. 161.

Upon the termination of the partnership, an account is to be taken, and provision made for the intermediate management and winding up of the business, for which purpose it may be necessary to appoint a receiver. The same person may be a member of two firms, having dealings together, neither of which can maintain an action at law against the other. Upon the dissolution of one of the firms, their affairs can only be adjusted by a suit in equity in which all of the parties are brought before the court. *Bosanquet* v. *Wray*, 6 Taunt. 597. Partners are entitled to have real estate belonging to the firm, which has

been conveyed to or become vested in one of the partners or his heir, converted into money in order to have it applied as partnership stock, which right, though admitted in principle by the courts of common law, cannot be enforced there. Finally, the affairs of the partnership may have been wound up, excepting that some of the partners having paid more than the others, there exists a right to compel contribution which can only be effectually done by a court of equity.

Rent may be recovered in equity when the remedy has become difficult or doubtful at law, or there is an apparent perplexity and uncertainty of the title and of the extent of the defendant's responsibility. *Livingston* v. *Livingston*, 4 Johns. Ch. 287; *Swedesborough Church* v. *Shivers*, 16 N. J. Eq. (1 C. E. Green) 453; Vol. 1, 186. But a court of equity will not interfere when the remedy at law is entirely adequate, nor when the plaintiff has lost his remedy at law, by his own negligence. 1 Fonb. Eq., B. 1, ch. 3, § 3. Courts of equity have concurrent jurisdiction with courts of law in cases of private nuisance. *Persons* v. *Thornton*, 33 Ga. Supp. 141.

§ 11. **Election between equitable and legal remedies.** Where the jurisdiction of a court of law and a court of equity is concurrent, the party may elect as to the tribunal in which he will make his defense, and once having made the election, he is bound by the decision. If a vendee of real estate, upon discovering a defect in his vendor's title, collect, by process of law, damages sustained by reason of the defect, he thereby elects to regard the contract as valid, and cannot afterward maintain a bill in equity to have it rescinded. *Smith* v. *Pettus*, 4 Rich. Eq. 197. Where a suit in equity was brought to set aside a deed, made by the complainant, on the ground that it was obtained from him by fraud, and an action of ejectment for the land, commenced by him before the filing of his bill, was pending, he was directed to elect in which court he would proceed. *Freeman* v. *Staats*, 8 N. J. Eq. (4 Halst.) 814.

When defense is made at law, equity will not take cognizance of the cause and rehear it upon the same state of facts upon which it was tried at law, unless the defendant can show that he has some special equity, such as fraud or accident, without negligence on his part, by which a valid defense was rendered unavailing. *Nelson* v. *Dunn*, 15 Ala. 501. If a party resist a recovery against him in a court of law upon a portion of his defense, where he had full knowledge of the whole defense, and where, by due inquiry and ordinary efforts, he could have obtained the proof, he is, like other litigants in similar cases, bound by the election, and is deemed to have waived the grounds of defense so omitted to be made. *Hempstead* v. *Watkins*, 6 Ark. (1 English) 317. But an un-

successful effort to plead equitable defenses at law will not bar the defendants of relief in equity. *Nelson* v. *Hatch*, 15 Ala. 501. And although the defendant in an action at law be able to prove that his signature to a writing obligatory was obtained by fraud, and thus to defeat the action, yet it is competent for him, at his election, to suffer judgment to go against him, and to apply to a court of equity for relief. *Britton* v. *Crabtree*, 20 Ark. 309.

As the order to elect proceeds upon the supposition that if the allegations in the plaintiff's bill are true, his remedy is concurrent in law and equity, he should not be compelled to elect until the defendant has answered *Soule* v. *Corning*, 11 Paige, 412. It is not optional with a party whether he will proceed at law or in equity; for he cannot resort to chancery where his remedy is adequate at law. *Currier* v. *Rosebrooks*, 48 Vt. 34.

§ 12 **Restraining suits.** A court of equity will restrain an action at law, whenever an equitable title is not recognized, or an equitable right not enforced, or where complete justice between the parties cannot be done at law. The jurisdiction will be exercised to prevent a party from depriving another of his rights, or subjecting the other to unjust vexation or injury irremediable by a court of law, whenever, owing to equitable circumstances, it is against conscience that the party should proceed with the cause.

The most usual ground for restraining proceedings at law is, where the rights of the party are wholly equitable, or cannot, under the circumstances, be asserted in a court of law, or where, in consequence of fraud, mistake, accident, or the want of discovery, one of the parties in an action at law is likely to obtain an unfair advantage over the other. The relief may be granted at any stage of the proceedings; to stay a trial at law; to stay judgment; or after judgment, to stay execution; or to stay the money in the hands of the sheriff; or if part only of the judgment debt has been levied, to restrain the suing out of another execution. *Emerson* v. *Udall*, 13 Vt. 477; *Ocean Ins. Co.* v. *Fields*, 2 Story, 59.

When it is against conscience to execute a judgment, and the injured party could not have availed himself of the objection in the court of law, or was prevented from availing himself of it, by fraud or accident without fault on his part, a court of equity will grant relief. *Horn* v. *Queen*, 5 Nebr. 472; *Marine Ins. Co.* v. *Hodgson*, 7 Cranch, 332; *Duncan* v. *Lyon*, 3 Johns. Ch. 356; *Norton* v. *Woods*, 5 Paige's Ch. 249; *Miller* v. *McCan*, 7 id. 451; *Hibbard* v. *Eastman*, 47 N. H. 507; *Robinson* v. *Wheeler*, 51 id. 384; *Brown* v. *Hurd*, 56 Ill. 317. The ground of equitable interposition may be, that a judgment creditor

is attempting to set up or enforce against the judgment debtor, or some person claiming under him, a judgment which has been paid; or the creditor may have agreed not to enforce the judgment, and thereby induced the debtor to contract irrevocable engagements. *Brinckerhoff* v. *Lansing*, 4 Johns. Ch. 65; *Paddock* v. *Palmer*, 19 Vt. 581; *Richardson* v. *Baltimore*, 8 Gill, 433. A judgment has been restrained notwithstanding the application might have been entertained at law (*King* v. *Baldwin*, 17 Johns. 384; *Viele* v. *Hoag*, 24 Vt. 46); though with the facilities now afforded by courts of law, for setting aside verdicts, obtaining new trials, and opening judgments, such a case would seldom be likely to occur.

Excepting in the case of the foreclosure of a mortgage and an action upon the accompanying bond, a court of equity will restrain a party from proceeding both at law and in equity at the same time, or from resorting to another tribunal after the court of equity has once got possession of the cause. Eden on Injunc. 34–38; *Rogers* v. *Vosburgh*, 4 Johns. Ch. 84. After a decree in equity against a party upon the merits, he will not be permitted to proceed at law, or to file a bill in a foreign court, for the same matter. *Booth* v. *Leycester*, 1 Keen. 579. And suits at law brought against the officers of a court of equity for acts done in executing the processes of the court will be restrained. *Parker* v. *Browning*, 8 Paige, 388; *Mackay* v. *Blackett*, 9 id. 437.

Proceedings at law will not be restrained where the party has lost his defense at law through his own negligence, or has omitted to move for a new trial within the time required at law; nor on the ground of a mistake in pleading, or in the conduct of the cause; nor on account of an erroneous decision, or a failure to obtain fresh evidence; nor merely to let in new corroborative proofs. *Smith* v. *Lowry*, 1 Johns. Ch. 320; *Lodge* v. *Strong*, 2 id. 230; *Sample* v. *Barnes*, 14 How. 70; *Powell* v. *Stewart*, 17 Ala. 719; *Tarver* v. *McKay*, 15 Ga. 550; *Smith* v. *Walker*, 8 Smedes & Marsh. 131; *Hudson* v. *Kline*, 9 Gratt. 379; *Greenfield* v. *Frierson*, 7 Heisk. 633.

Equity will not restrain proceedings in any criminal or other matter which is not strictly of a civil nature; such as proceedings on an indictment, or criminal information, or on a mandamus or prohibition; unless the persons prosecuting the same are also at the same time proceeding as plaintiffs in equity in regard to the same matter. *Montague* v. *Dudman*, 2 Ves. Sr. 396; *Burnett* v. *Craig*, 30 Ala. 135; Roberts' Princ. of Eq. 201. See title *Injunction*, art. 7, §§ 1–11.

ARTICLE II.

EQUITABLE JURISDICTION, HOW AND WHEN EXERCISED.

Section 1. In general. Having considered the principal subjects relating to the exclusive and concurrent jurisdiction of equity (art. 1 §§ 2–10), there remains to be treated the jurisdiction arising from the nature of the remedies administered. This will lead to the consideration of topics connected with the heads of jurisdiction previously surveyed, and also of such as are embraced in the auxiliary jurisdiction. These remaining subjects will be treated in the following order; bills of discovery and bills to perpetuate evidence; cancellation of written instruments; specific performance; bills *quia timet;* bills of peace; injunctions; writs of *ne exeat regno*, and *supplicavit.*

The jurisdiction of equity in compelling discovery is extremely ancient. It was designed to mitigate the evils caused by the disqualification of the parties litigant as witnesses. Vol. 2, 540, 551. A plaintiff at law might sue a defendant, notwithstanding the existence of facts known only to the parties to the action, and which, if given in evidence, would be a defense. Under these circumstances, the defendant was perpermitted to file a bill in equity against the plaintiff at law requiring him to answer, upon oath, interrogatories, and thus compel the plaintiff at law to admit the facts of the case. A plaintiff at law had likewise a right to file a bill for discovery in aid of his action at law. In addition to the cases in which the object of the bill was to obtain an admission of the facts exclusively within the knowledge of the parties litigant, there were others in which the aim was to obtain a discovery and production of documents; which was effected in equity by means of the ordinary interrogatory as to documents, and subsequent motion for production. Hayne's Outlines of Eq. 128, 129.

The mode of redress by bill of discovery was of very great importance so long as no power to elicit testimony from a party to an action existed at common law. But since, by statutes in most of the States, parties to actions have been made competent and compellable to testify, and the production of books and papers may now be enforced in proceedings at law, the common-law tribunals have been rendered to a great extent independent of the auxiliary jurisdiction of equity in this regard. The rules in relation to this remedy are, however, still important, especially since in England and in some of the States, the equity jurisdiction is exercised notwithstanding the above-mentioned changes in proceedings at law.

In order to maintain a bill of discovery an action must have been

brought in another court, unless the object of discovery be to ascertain who is the proper party against whom the suit shall be brought. It will not lie in aid of a criminal prosecution (Vol. 2, 544); nor to compel a party to criminate himself; nor to aid a proceeding in a court which is itself competent to grant the relief (Vol. 2, 545); nor to discover facts not material to the case (Vol. 2, 546); nor to discover evidence upon which the defendant relies for his defense, unless it is also a part of the plaintiff's case. Id.; Story's Eq. Jur., § 1418 *et seq.;* Hare on Discovery, 110; Wigram on Discovery, 15; *Lowell* v. *Galloway*, 17 Beav. 1; *Shotwell* v. *Smith*, 5 C. E. Green, 79.

It sometimes happens that a person entitled presumptively to some right finds his title threatened by some person interested in disputing it, and yet, in consequence of the future or reversionary nature of his title, the law affords him no means of asserting or establishing it. Meanwhile, the testimony upon which his title depends, may be in danger of perishing by the death of those who, if alive, would be able to testify. The party claiming such future interest is, therefore, allowed to file a bill in equity against all persons who are interested in disputing it, asking that the testimony may be perpetuated. To maintain a bill to perpetuate testimony, the matter in controversy must not be such as can be made the subject of immediate judicial investigation. But unlike a bill of discovery, a bill to perpetuate testimony will lie in a case involving a penalty or forfeiture; and any interest, however small and remote, or only contingent, is sufficient to sustain the bill. Haynes' Outlines of Eq. 174; Story's Eq. Jur., § 1509; *Angell* v. *Angell*, 1 Sim. & Stu. 83; *Fitzhardinge* v. *Dursley*, 6 Ves. 251.

The power to direct the delivery and cancellation or rescission of agreements, securities, deeds, or other written instruments, is an old head of equity jurisdiction, and is founded upon the administration of protective or preventive justice. *Wynne* v. *Lumpkin*, 35 Ga. 208; *Pierce* v. *Lamson*, 5 Allen, 60; *Glastenbury* v. *McDonald*, 44 Vt. 450.

It has been doubted whether a bill in equity will lie to cancel or set aside an instrument void upon its face; as the validity of such an instrument may be contested at law. But it is now settled that the jurisdiction will be entertained; and the mere fact, that the grounds upon which the jurisdiction of the court of equity is invoked may avail the party in an action at law, is not a valid objection to the exercise of such jurisdiction, which rests upon the capacity of courts of equity to administer more effectual relief than can be afforded at law. *Hays* v. *Hays*, 2 Ind. 28; *Porter* v. *Jones*, 6 Cold. 313; *Cornish* v. *Bryan*, 10 N. J. Eq. (2 Stockt.) 146. The exercise of this power is, however, in the

sound discretion of the court, and is regulated by the circumstances of each case. When a court of equity is asked to set aside and cancel an illegal contract, the inquiry is, has the complainant made such a case as would, were he innocent, entitle him to relief? And if so, do the best interests of society require that relief should be afforded notwithstanding the guilt of the party? *Porter* v. *Jones*, 6 Cold. 313. The resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable character, or because the defense not arising on its face may be difficult or uncertain at law; or from some other special circumstances peculiar to the case, and rendering a resort to equity proper and clear of all suspicion of any design to promote expense and litigation. *Hamilton* v. *Cummings*, 1 Johns. Ch. 517. Ordinarily, a party must wait until his rights have actually been interfered with, before he can implead another from whom he anticipates injury. If the claim is based upon a written instrument void upon its face, so that no lapse of time or change of circumstances can weaken the means of defense, a court of equity will not decree its cancellation. Where, however, there is a valid defense resting upon evidence which may be lost by lapse of time or imperfection of memory, the court will entertain the suit without waiting for the assertion of the claim. *Scott* v. *Onderdonk*, 14 N. Y. (4 Kern.) 9; *New Haven R. R. Co.* v. *Schuyler*, 17 N. Y. (3 Smith) 592.

A court of equity will not decree the cancellation of a contract, except for fraud or mistake affecting the very substance of the contract. *Brooks* v. *Stolley*, 3 McLean, 523; *Scott* v. *Perkins*, 4 W. Va. 591. It will rescind a written instrument where it has been procured by false representations, or by the fraudulent suppression of the truth, if it appear that its rescission is necessary to protect the opposite party from pecuniary loss. It will rescind or enjoin the instrument, when it operates as a cloud upon the title of the opposite party (Vol. 1, 662–669), or when the instrument is of such a character that the vice in it would be unavailing as a defense by the injured party if the instrument were transferred for value into the hands of an innocent holder. Title deeds, fraudulently procured, may, under such circumstances, be decreed to be canceled or reformed, as the case may be; and bills of exchange or promissory notes may be enjoined and practically divested of their negotiable quality. But when the defense at law is perfect, a suit in equity will not be sustained. *Ins. Co.* v. *Bailey*, 13 Wall. 616.

When the vendor of land has been overreached by imposition, concealment, or misrepresentation, on which he properly relied, relief will be afforded, unless there has been great and unexplained delay in seeking it, or there is an adequate remedy at law, or the condition of the

property in controversy is such as to render it impracticable for the court on any sound principle to grant relief. *Warner* v. *Daniels*, 1 Woodb. & M. 90.

And a court of equity may order the surrender and cancellation of a policy of insurance alleged to have been obtained by fraud, and held by the promisee, upon which no action has been brought. *Globe Mut. Life Ins. Co.* v. *Reals*, 48 How. Pr. 502.

A bill will lie to cancel a void or voidable deed, although the defendants are in possession, and the complainants have a legal title and might sue at law for the recovery of the property; that not being esteemed adequate relief. *Almony* v. *Hicks*, 3 Head, 39; *Bunce* v. *Gallagher*, 5 Blatchf. 481.

An entire failure of consideration is often sufficient to rescind a contract; but not mere inadequacy of consideration. *Warner* v. *Daniels*, 1 Woodb. & M. 90.

Equity will rescind an unconscionable bargain at the instance of the injured party which was extorted from a person who is feeble-minded and in distress. *Esham* v. *Lamar*, 10 B. Monr. 43. Although mere ignorance of law will not in general be sufficient to induce a court of equity to set aside a contract, yet it is otherwise if superinduced by the other party, or there was a misplaced confidence, or advantage taken of the weakness of intellect of the complainant. *Sparks* v. *White*, 7 Humph. 86.

A degree of weakness of intellect far below that which would justify a jury in pronouncing a verdict of lunacy, coupled with other circumstances to show that the weakness was taken advantage of by undue influence or deceitful misrepresentations, will be sufficient to set aside a deed or contract of sale. *Craddock* v. *Cabiness*, 1 Swan, 474; *Hill* v. *McLaurin*, 28 Miss. 288. The acts and contracts of persons who are of weak understanding, and who are thereby liable to imposition, will be held void by courts of equity, if the nature of the act or contract justifies the conclusion that the party has not exercised a deliberate judgment, but has been imposed upon, circumvented, or overcome by cunning or undue influence. It is immaterial from what cause such weakness arises; whether from temporary illness, general mental imbecility, the natural incapacity of early infancy, the infirmity of extreme old age, or those accidental depressions which result from sudden fear or overwhelming calamity. *Tally* v. *Smith*, 1 Cold. 290. Incapacity from intoxication is not always sufficient to avoid a contract. But when a transaction is characterized by weakness of mind, pecuniary embarrassment, inadequacy of price, an enterprising and sagacious adversary, and an unconscientious advantage, a court of equity will set

it aside. *Marshall* v. *Billingsly*, 7 Ind. 250; *Freeman* v. *Dwiggins*, 2 Jones' Eq. 162.

A court of equity will not rescind a contract merely because it would not enforce it. *Beller* v. *Jones*, 22 Ark. 92; *Cook* v. *Cole*, 6 N. J. Eq. 522–627. And the mere fact that a person is of weak understanding, if there be no fraud or surprise, is not an adequate cause of relief. *Nace* v. *Boyer*, 30 Penn. St. 99; *Aiman* v. *Stout*, 42 id. 114. A conveyance will not be set aside on the ground of undue influence apart from fraud, where the transaction was proper in itself, and for the advantage of the party who seeks to avoid it: as a conveyance of a man habitually intemperate (but not actually drunk), of all his property in trust for his wife and children. *Birdsong* v. *Birdsong*, 2 Head, 289. A court of equity will not, on the application of a lunatic, or those claiming under him, set aside a contract of sale overreached by an inquisition of lunacy, if the purchase be fair, for a full consideration, and without notice of the lunacy to the purchaser; especially where the parties cannot be fully reinstated in the condition in which they were prior to the purchase. *Yauger* v. *Skinner*, 14 N. J. Eq. (1 McCart.) 389.

Although the mistake in a writing which equity will correct must be the mistake of both parties, yet the court has power to rescind and cancel an agreement at the request of one party, upon the ground that without negligence he entered into it through a mistake of facts material to the contract, when it can be done without injustice to the other party. *Diman* v. *Providence, etc., R. R. Co.*, 5 R. I. 130.

It is not within the province of a court of equity to set aside a sheriff's sale under execution and deed. But if the objections be equitable merely, or such as, though not sufficient to quash the sale, furnish ground for depriving the purchaser wholly or partially of the legal advantage he has obtained, the court might direct a conveyance upon equitable terms; or, under particular circumstances, might subject the property to a resale. *Cassiday* v. *McDaniel*, 8 B. Monr. 519.

Bills for the specific performance of contracts are among the earliest recorded; the ground of equitable jurisdiction being mainly the inadequacy of pecuniary damages, or the impossibility of arriving at them. At common law, when there was a failure to fulfill an agreement, the only remedy, as a general rule, was damages for non-performance. Land belonging to a party could be recovered by him; but a contract to sell land could not be enforced. The action of replevin, which in some of the States is now employed as a

remedy, whenever a person claims personal property in the possession of another and seeks to recover it specifically, originally lay only for the taking of goods under a wrongful distress. 3 Bl. Com. 146; Broom & Had. Com. (Wait's ed.) 69.

Equity in a proper case will compel specific performance whenever damages will not afford adequate relief. The situation of land may give it, in the estimation of the purchaser, a peculiar value, so that damages, although they would enable him to buy other land, would not compensate him. Personal property may be such as damages would not enable the buyer to replace; or the damages for its loss may be incapable of ascertainment. And the same may be true of agreements to do personal acts, as to do certain work. These, and similar cases, furnish grounds for the interference of the court. *Buxton* v. *Lister*, 3 Atk. 383; *Adderly* v. *Dixon*, 1 Sim. & Stu. 607; *McKnight* v. *Robbins*, 1 Halst. Ch. 229; *Carpenter* v. *Mut. Safety Ins. Co.*, 4 Sandf. Ch. 408; *Kirksey* v. *Fike*, 27 Ala. 383; *Ashe* v. *Johnson*, 2 Jones' Eq. 149; *Binney* v. *Annan*, 107 Mass. 94; *Sauk* v. *Union Steamship Co.*, 5 Phil. (Penn.) 499.

In compelling the delivery of specific chattels, courts of equity furnish a remedy which would often be wholly inadequate at law. The ground of relief is the peculiar nature of the chattel, or the relation which the parties sustain to each other; as where it is an article of curiosity, or memorial of affection, or insignia of office, or has been held in trust. If it has none of these characteristics, and its loss can be compensated in damages, there will be no occasion to depart from the ordinary remedies at law. *Pusey* v. *Pusey*, 1 Vern. 273; *Duke of Somerset* v. *Cookson*, 3 P. Wms. 389; *Cowles* v. *Whitman*, 10 Conn. 121.

When the court has no proper means of superintending and beneficially enforcing performance, it will not interfere; nor where its interference would be useless. *Fitzpatrick* v. *Featherstone*, 3 Ala. 40. Equity will not, therefore, in general enforce the specific performance of an agreement to enter into a partnership which may be dissolved at the will of either party. But an agreement to enter into partnership for a specified time and purpose and to furnish a share of the capital stock, will be enforced (*Crawshay* v. *Maule*, 1 Swanst. 511, note; *Birchett* v. *Bolling*, 5 Munf. 442); and after the partnership has commenced, the articles will be carried into effect if it can be done beneficially, unless there is a complete and adequate remedy at law. An agreement between heirs to divide land, or between persons to make mutual wills where one has died after making the agreed will, may be enforced. When a person enters into a bond or covenant with a penalty, he cannot relieve

himself from the performance of the contract by paying the penalty. *Moorer* v. *Kopmann*, 11 Rich. Eq. 225; *Hooker* v. *Pynchon*, 8 Gray, 550; *Dailey* v. *Litchfield*, 10 Mich. 38; *Hull* v. *Sturdivant*, 46 Me. 34. And where an agreement provides that it shall become void on the non-performance of certain acts, the person neglecting or refusing to perform them cannot avoid the agreement; but only the other party. Roberts' Princ. of Eq. 118–119.

Whenever the specific performance of a contract respecting real estate would have been decreed between the contracting parties, it will be directed between those who claim under them, unless other equities intervene. Specific performance can, therefore, in general, be enforced by the heir, executor, devisee, legatee, or assignee; and the heir or devisee of the purchaser can, if the assets are sufficient, require the purchase-money to be paid out of his personal estate. *Champion* v. *Brown*, 6 Johns. Ch. 403; *Ewins* v. *Gordon*, 49 N. H. 444; *Laverty* v. *Moore*, 33 N. Y. (6 Tiff.) 658. See *Specific Performance.*

Where the statute requires a contract to be in writing, equity will enforce it notwithstanding it is by parol. 1st. Where it was not reduced to writing through the fraud of one of the parties, and its terms can be satisfactorily shown; 2d. Where the defendant, by his answer, admits the agreement, and does not insist upon the statute; 3d. Where there has been a part performance, and the terms of the agreement can be fully established. To constitute a part performance it is not sufficient that the acts are merely introductory or ancillary to the contract, such as depositing, securing, or paying the purchase-money, giving directions for a conveyance, going to view the estate, or acts of a similar character; but they must be such as are done in part execution of the substance of the contract, so that the party performing them will sustain injury if the other party does not perform his part. Taking possession with the vendor's consent, or making improvements, or expending money on the property, will be deemed a part performance. Roberts' Princ. of Eq. 125, 126; *Wright* v. *Pucket*, 22 Gratt. 374; *Gough* v. *Crane*, 3 Md. Ch. 119; *Parkhurst* v. *Van Cortland*, 14 Johns. 15; *Purcell* v. *Miner*, 4 Wall. 513; *Allen* v. *Chambers*, 4 Ired. Eq. 125; *Freeman* v. *Freeman*, 43 N. Y. (4 Hand) 34.

Where a person intends to make provision for, or to bestow a gift upon another, and he does not do it in consequence of the promise of a third party to carry such intention into effect, such promise will be enforced. Where, therefore, a testator intended to cut down timber in order to secure portions for his younger children, but refrained at the solicitation of his eldest son, who promised that he would donate the value to his brothers and sisters, and the son after his father's death

refused to fulfill his promise, he was compelled. *Dutton* v. *Pool*, 2 Lev. 211. When the promise of a father to convey land to his child is conclusively established, and the child, upon the faith of it, has entered into possession, and made valuable and permanent improvements, the donee may compel specific performance; but not where the improvements made by the donee are temporary, of little value, or merely for his convenience as an occupying tenant. *Moore* v. *Pierson*, 6 Iowa, 279. Where an agreement upon which money had been paid was rescinded, and the amount to be repaid left to the honor of one of the parties who refused to repay any thing, it was held that a promise to repay what was just and equitable was implied, and that such implied promise was within the jurisdiction of a court of equity. *Nicholson* v. *Pim*, 5 Ohio St. 25.

An agreement which is not certain, mutual and reasonable, or which is tainted with fraud, surprise, improper concealment, or misrepresentation, duress, or undue influence, will not be enforced. *Flight* v. *Bolland*, 4 Russ. 298; *Cathcart* v. *Robinson*, 5 Peters, 264; *German* v. *Machin*, 6 Paige, 288; *Bruck* v. *Tucker*, 42 Cal. 346; *Waring* v. *Ayres*, 40 N. Y. (1 Hand) 357.

Equity will not decree the specific performance of a contract which cannot be substantially performed by the person seeking relief, or which cannot be lawfully performed, or is against public policy; or where its performance would involve a breach of trust; or where the plaintiff has been guilty of negligence affecting the essence of the contract; or where there is a substantial defect in the title which cannot be remedied before the decree; or where the condition of the property is so changed, that the terms of the agreement cannot be carried out; or when from any other reason it would be inequitable to require its performance *Finch* v. *Parker*, 49 N. Y. (4 Sick.) 1; *Rose* v. *Swann*, 56 Ill. 40; *Western R. R. Co.* v. *Babcock*, 6 Metc. 346; *Peters* v. *Delaplaine*, 49 N. Y. (4 Sick.) 362.

Where a vendor is found a lunatic from a date subsequent to the time of the contract to purchase, but prior to the execution of the conveyance, the purchaser may enforce the completion of the contract, by a bill for specific performance. If the lunacy be found as of a date prior to the contract of purchase, the other party may file a bill for specific performance, and obtain an issue to inquire whether the defendant was a lunatic, or whether the contract was executed during a lucid interval; and if the issue be found in his favor, he may have a decree for specific performance. *Yauger* v. *Skinner*, 14 N. J. Eq. (1 McCart.) 389.

When the terms of a sale have not been reasonably complied with on the part of the vendor, equity will decree a specific performance as

far as possible, with compensation; and when a person who has performed a valuable portion of an agreement is by accident, without any blame on his part, prevented from performing the residue, and is not in a situation to avail himself of the part performed, equity will decree specific performance if compensation can be given for the injury which may have resulted from the non-performance. Roberts' Princ. of Eq. 132, 133; *Jervis* v. *Smith*, 1 Hoffman's Ch. 470; *Nagle* v. *Newton*, 22 Gratt. 814; *Peabody* v. *Tarbell*, 2 Cush. 226; *Nelson* v. *Hagerstown Bank*, 27 Md. 76; *Woodman* v. *Freeman*, 25 Me. 531.

Bills *quia timet* are entertained where the plaintiff fears some future probable injury to his rights or interests in equitable property, whether the right of enjoyment be present or future; as the squandering of property by a trustee or by executors or administrators, to which the complainant has a present or fixed future title. Vol. 1, 654–661. In regard to legal property, the jurisdiction is, in general, only exercised where danger is apprehended to the future or contingent right of enjoyment; the remedies at law being usually sufficient for the protection of the present right. The relief may be rendered by the issuing of an injunction; by the appointment of a receiver for the benefit of all of the parties in interest; by ordering the payment of money into court; or by directing the giving of security. Id.; Story's Eq. Jur., § 826.

Although this remedy is not, strictly speaking, usually employed in respect to the title or rights to the possession of real estate. (*Mad. Av. Baptist Church* v. *Mad. Av. Baptist Church*, 26 How. Pr. 72); yet the jurisdiction of equity to remove a cloud from the title takes its rise in the doctrines of *quia timet*, in order to give repose and peace to the party in possession by virtue of a rightful claim or title against one who may vex and harass with suits after the right has been fairly tested in a court of law; or against a deed or other evidence of title which has been fraudulently obtained, and which may be set up after the evidence which could manifest its true character has become obscure or has passed away. *Armitage* v. *Wickliffe*, 12 B. Monr. 488; *Horn* v. *Jones*, 28 Cal. 194; *Huntington* v. *Allen*, 44 Miss. 654.

To constitute a cloud upon title, there need not be a title upon record apparently valid. It is sufficient if there be a deed valid upon its face, accompanied with a claim of title based upon facts showing an apparent title, under such circumstances that a court of equity can see that the deed is likely to work mischief to the real owner of the property. In such a case the court will exercise its preventive justice upon the doctrine *quia timet*, and will quiet the title. Vol. 1, 662; *Fonda* v. *Sage*, 48 N.Y. (3 Sick.) 173; *Allen* v. *City of Buffalo*, 39 N.Y. (12 Tiff.) 386; *Tisdale* v. *Jones*, 38 Barb. 523. Where the title against which

relief is prayed is of such a character as, if asserted by action and put in evidence, it would drive the other party to the production of his own title in order to establish a defense, it is a cloud which the latter has the right to call upon the court to remove. *Lick* v. *Ray*, 43 Cal. 83; Vol. 1, 662. Although a court of equity will not adjudicate upon a legal title, yet it will take notice of what is necessary to constitute a valid legal title when its aid is asked for on the ground of the legal title, and will require the party to show a *prima facie* title. *Griffin* v. *Carter*, 5 Ired. Eq. 413.

When a person owns and is in possession of land, and there is a cloud on his title by reason of a claim made to the land by others, which prevents its sale for a fair market value, a court of equity will entertain a suit to adjust the pretensions, or settle the priorities of the conflicting claimants; and where there is an outstanding deed which improperly clouds the title of the true owner, he may resort to equity and have such deed canceled. Vol. 1, 664, 665; *Eldridge* v. *Smith*, 34 Vt. 484; *City of Hartford* v. *Chipman*, 21 Conn. 488; *Anderson* v. *Hooks*, 9 Ala. 705; *Loring* v. *Downer*, 1 McAll. 360; *Walker* v. *Peay*, 22 Ark. 103; *Standish* v. *Dow*, 21 Iowa, 363; *Shattuck* v. *Carson*, 2 Cal. 588; *Shell* v. *Martin*, 19 Ark. 139; *Downing* v. *Wherrin*, 19 N. H. 9; *Brewton* v. *Smith*, 28 Ga. 442. A title to land by prescription, part of which is in the possession of another under a sheriff's deed, is a sufficient ground for relief. *Marston* v. *Rowe*, 39 Ala. 722.

A bill in equity will lie to have a void decree as to the sale of real estate rescinded. *Johnson* v. *Johnson*, 30 Ill. 215. And where a levy and sale are void, and the defendant is claiming land under them, a court of equity will render a decree quieting the title. *Stout* v. *Cook*, 37 Ill. 283. Where a mortgagee obtains a decree of foreclosure against the personal representatives and devisees of the mortgagor without making the heirs parties, and buys the land at the sale, it constitutes such a cloud on the title of the heirs as to enable them, after setting aside the probate of the will, to apply to a court of equity for its removal. *Hunt* v. *Acre*, 28 Ala. 580. A court of equity will, in its discretion, permit a purchaser of land, whose conveyance is overreached by an inquisition of lunacy, to traverse the finding of the jury upon his agreeing to be bound by the final decision upon the traverse. He is entitled, if he has acted in good faith, either to have the contract confirmed and his title declared valid, or to have it declared void, and to be released from the obligations of his contract. *Yauger* v. *Skinner*, 14 N. J. Eq. (1 McCart.) 389.

A party may resort to equity to remove a cloud which hangs over his title either by an actual or threatened sale of the land as the property

of another. *Burt* v. *Cassety*, 12 Ala. 734; *Lyon* v. *Hunt*, 11 id. 295. The jurisdiction of equity is intended to reach persons out of possession who cannot be compelled to defend their right. *Barron* v. *Robbins*, 22 Mich. 35. Where a widow permits a person to purchase and pay for land of her former husband under the assurance that she claims no dower therein, and she has the use of the purchase-money as a bequest under the will of her husband, and she afterward institutes proceedings to have her dower assigned to her, and threatens to bring ejectment, a suit may be maintained to remove the cloud upon the title thereby occasioned. *Wood* v. *Seely*, 32 N. Y. (5 Tiff.) 105.

Where land is unoccupied, or in the actual possession of a person other than the complainant, a court of equity will not entertain a suit to remove a cloud from the title, there being an adequate remedy at law. *Miller* v. *Neiman*, 27 Ark. 233; *Moran* v. *Taylor*, 13 Mich. 367. But the reason of the rule is not applicable to mere equitable titles which cannot be enforced at law. *Smith* v. *McConnell*, 17 Ill. 135; *Freeman* v. *Wild*, 38 Me. 313; *Murphy* v. *Blair*, 12 Ind. 184. And an action to restrain the sale of land, and to prevent a cloud from being cast on the plaintiff's title, may be brought by the grantee out of possession against his grantor. *Thompson* v. *Lynch*, 29 Cal. 189. Where a deed is given to secure a loan of money, and after the debt becomes due, the grantee claims the absolute ownership of the land, and denies the right of the grantor to redeem, he may maintain a suit in equity to have the deed adjudged to be a mortgage, to settle the amount due thereon, and to redeem. *Zimmerman* v. *Marchland*, 23 Ind. 474. Equity interferes to remove clouds upon the title because they embarrass the owner of the property clouded, and tend to impede his free sale and disposition of it. Therefore a party cannot maintain a suit to remove a cloud upon the title to land in which he has no interest, upon the sole ground that he has warranted the title. *Bissell* v. *Kellogg*, 60 Barb. 617; 65 N. Y. (20 Sick.) 432.

Suits to obtain repose from perpetual litigation, termed Bills of Peace, are brought either, 1st, in order to confirm some right which has been established by more than one trial at law, but is likely to be again litigated; or, 2d, to establish and perpetuate against a number of persons some private right which, from its nature, they may probably attempt to overthrow by different actions; or to give repose where many persons possess, or suppose they possess, some common right which is disputed by some other person who is in a position to litigate separately at law, with each of his opponents, their title to the right. *Woods* v. *Monroe*, 17 Mich. 238; *Hodges* v. *Griggs*, 21 Vt. 280. See Vol. 1, 649–653.

To the first class may be referred the relief which equity will award by perpetual injunction against proceedings where two or more trials in ejectment have been had respecting the same right, and decided in favor of the same person. *Patterson* v. *McCamant*, 28 Mo. 210; *Marsh* v. *Reed*, 10 Ohio, 347; *Craft* v. *Lathrop*, 2 Wall. Jr. 103. It has not been held that any precise number of verdicts at law is required before a bill of peace can be sustained; but the better rule seems to be that the title at law must have been fully and fairly established by one or more trials. *Harmer* v. *Gwynne*, 5 McLean, 313.

Where real estate is laid out into town lots which are held by numerous persons who are threatened with suits, a bill in equity may be maintained to quiet the title, notwithstanding the claimants have a legal title and each has an adequate remedy at law. *Crews* v. *Burcham*, 1 Black, 352. But when a bill of peace is filed to establish a right in which many are interested, relief will be refused if it can be afforded by a court of law by an order consolidating the suits. *Peters* v. *Prevost*, 1 Paine's C. C. 64; Vol. 1, 649–653.

No equitable remedy is comparable to the injunction in promptness and completeness; and there is none which is so frequently and extensively employed. The protection of equitable rights by enjoioing proceedings at law, having already been considered (*ante*, art. 1, § 12), the preventive remedy by injunction, when injury to other rights is threatened, alone remains to be considered. It would be difficult to enumerate all the instances in which this species of equitable interposition is obtained. In the endless variety of cases in which a plaintiff is entitled to equitable relief, whenever that relief consists in restraining the commission or the continuance of some act of the defendant, a court of equity administers it by means of an injunction. Eden on Injunct. 11; *Atty.-Genl.* v. *N. J. R. R. & Transportation Co.*, 2 Green's Ch. 136.

An injunction will be granted when a breach of trust is threatened, or when executors endanger the assets of an estate by their mismanagement; to restrain the transfer of stock the title to which is controverted; to prevent the alienation of property *pendente lite;* to restrain the creditors of the husband from selling the separate property of the wife; to prevent partners from doing acts in violation of the partnership agreement; to restrain the disclosure of confidential communications. *King* v. *King*, 6 Ves. 172; *Chedworth* v. *Edwards*, 8 id. 46; *Osborn* v. *Bank of U. S.*, 9 Wheat. 845; *Murray* v. *Ballou*, 1 Johns. Ch. 576; *Murray* v. *Lylburn*, 2 id. 444; *Thomas* v. *James*, 32 Ala. 723; *Smith* v. *Smith*, 4 Jones' Eq. 303; *Peabody* v. *Norfolk*, 98 Mass. 452.

The principal subjects of relief in equity by injunction for the protection of legal rights, are the following: Waste; nuisance; trespass; copyrights and inventions; literary property; trade-marks; sales and conveyances.

Equity interposes to restrain the commission of waste on account of the difficulty, and in some cases the impracticability of obtaining adequate redress at law. The mere belief of intended waste is not a sufficient ground for relief. Some threat must be made, or some act done. A landlord can obtain an injunction against his tenant; a mortgagee against a mortgagor in possession, if the security is insufficient; a mortgagor against a mortgagee; and one tenant in common against the other, if the waste occasion a destruction of the estate. *Douglass* v. *Wiggins*, 1 Johns. Ch. 435; *Hawley* v. *Clowes*, 2 id. 122; *Brady* v. *Waldron*, id. 148; *Ensign* v. *Colburn*, 11 Paige, 503; *Parsons* v. *Hughes*, 12 Md. 1; *Maryland* v. *Northern R. R. Co.*, 18 id. 193; *Nelson* v. *Pinegar*, 30 Ill. 473.

An injunction will sometimes be granted to restrain equitable waste, or such destructive acts as are not punishable at law as waste, in consequence of their being consistent with the legal rights of the party committing it, but which are deemed in equity unjustifiable, and to be restrained in consequence of their occasioning an unconscientious and irreparable injury to those who will succeed to the property; as the cutting down of saplings not suitable for timber, or the felling of trees planted for ornament. *Burges* v. *Lamb*, 16 Ves. 185; *Abraham* v. *Bubb*, Freem. Ch. 53; *Clement* v. *Wheeler*, 5 Fost. 361.

The jurisdiction of equity to restrain by injunction the commission or continuance of a public nuisance is of very ancient date. It is founded on the public injury that is likely to ensue, and the irreparable damage to individuals. Eden on Injunct., ch. 11, p. 259 *et seq.* An information will lie at the suit of the attorney-general to stop the mischief and restrain the continuance of it; and individuals who are aggrieved by it may also seek the assistance of the court by bill. But unless the fact of nuisance be clearly established, relief will be denied. *Earl of Ripon* v. *Hobart*, 3 Mylne & Keen, 169; *Hamilton* v. *N. Y. & Harlem R. R.*, 9 Paige's Ch. 171.

The court will interfere to restrain a private nuisance when the mischief would be irreparable; but not in every case in which an action would lie at law. There must be such an injury as from its nature is not susceptible of being adequately compensated by damages, or such as would, if continued, occasion a constantly recurring grievance which cannot be prevented except by injunction. On these grounds, injunctions have been granted to restrain the darkening of ancient windows,

the diversion of water-courses, the destroying of the banks of rivers, the carrying on of noxious trades, or such as are offensive to the senses; the conducting of noisy or dangerous manufactories, and other injurious acts. *King* v. *Miller*, 4 Halst. Ch. 559; *Biddle* v. *Ash*, 2 Ashm. 211; *Cherry* v. *Stein*, 11 Md. 1; *Parker* v. *Winnipiseogee Co.*, 2 Black, 545; *Ross* v. *Butler*, 19 N. J. Eq. (4 C. E. Green) 294; *Cleveland* v. *Citizens' Gas-light Co.*, 20 id. (5 C. E. Green) 201; *Carlisle* v. *Cooper*, 21 id. (6 C. E. Green) 576; *Webber* v. *Gage*, 39 N. H. 182; *Persons* v. *Hill*, 33 Ga. Supp. 141.

If parties own to the center of a stream in which there is a fall, it is a property right that the law will regard of some value; and if the waters be diverted from flowing in their natural channel, a court of equity will grant relief. *Corning* v. *The Troy Iron & Nail Factory*, 34 Barb. 485; 39 id. 311; 40 N. Y. (1 Hand) 191. Where there is an admitted common right among several owners of water power, a court of equity will entertain jurisdiction to regulate the common use, to determine the extent of their respective rights, and the proper mode of exercising and enjoying them, in order to prevent litigation and afford a more complete and perfect remedy than could be obtained at law. *Burnham* v. *Kempton*, 44 N. H. 78.

Ordinarily, a court of equity will not decide that a nuisance exists; but will require that the party first establish his right at law. It is, however, otherwise where the right is admitted, or the facts are admitted, so that the court can determine therefrom whether or not it is a case of nuisance. Where a person has been long in the quiet and uninterrupted enjoyment of a right, another person will be restrained from interfering therewith, until he proves his right at law. Id.

Relief in equity will be granted to restrain a trespass, when the trespasser is insolvent, and therefore unable to respond in damages; when the wrongful acts are likely to cause irreparable injury, or to impair permanently the future enjoyment of the property; and where the interference of the court is necessary to prevent a multiplicity of suits. *Livingston* v. *Livingston*, 6 Johns. Ch. 497; *N. Y. Printing and Dyeing Estab.* v. *Fitch*, 1 Paige's Ch. 97; *Kerlin* v. *West*, 3 H. W. Green. 449; *Musselman* v. *Marquis*, 1 Bush, 463; *Anderson* v. *Harvey*, 10 Gratt. 386; *Davis* v. *Reed*, 14 Md. 152; *Mayor of Frederick* v. *Groshon*, 30 id. 436; *Echelkamp* v *Schrader*, 45 Mo. 505.

The interests of an author or inventor in his copyright or invention will frequently be protected by injunction, on the ground that an action for damages would not afford adequate redress. When the legal title appears on the record, or has been established by uninterrupted usage and possession, the injunction will generally be granted at once. In

other cases, if the title is denied, the court will require it to be first established at law, retaining the bill in the interval, and obliging the defendant to keep an account of his dealings and profits respecting the matter in question. Roberts' Princ. of Eq. 204; *Bacon* v. *Jones*, 4 Mylne & Craig, 436; *Goodyear* v *Day*, 2 Wall. Jr. 283; *Wilkins* v. *Aiken*, 17 Ves. 424. When a publication is of a clearly irreligious, immoral, libelous, or obscene character, or involves a betrayal of confidence, or a breach of duty, equity will not afford relief. *Walcot* v. *Walker*, 7 Ves. 1; *Southey* v. *Sherwood*, 2 Meriv. 435. So, if it be illegal. *Hudson* v. *Johnson*, 45 Cal. 21; *Mattox* v. *Hightshue*, 39 Ind. 95.

The publication of manuscript treatises, dramas, or private letters, if attempted to be done without the author's consent, will be restrained by injunction; unless the letters be published in order to vindicate the recipient's character, or for the purposes of justice. *Pope* v. *Curl*, 2 Atk 342; *Percival* v. *Phipps*, 2 Ves. & Beam. 19; *Gee* v. *Pritchard*, 2 Swanst. 413; *Folsom* v. *Marsh*, 2 Story, 100; *Brandreth* v. *Lance*, 8 Paige's Ch. 24; *Bartlette* v. *Crittenden*, 4 McLean, 300. See *Injunction*.

The fraudulent use of trade-marks will be restrained by injunction; the ground of relief being, that it is not only an invasion of the rights of property, but that equity will not permit a party to practice a fraud by availing himself of another's reputation and deceiving the public. *Millington* v. *Fox*, 3 Mylne & Craig, 338; *Walton* v. *Crowley*, 3 Blatchf. 440; *Congress and Empire Spring Co.* v. *High Rock Spring Co.*, 45 N. Y. (6 Hand) 291; *Gillott* v. *Esterbrook*, 47 Barb. 455; 48 N. Y. (3 Sick.) 374; 8 Am. Rep. 553; *Hostetter* v. *Vowinkle*, 1 Dillion, 329; *Filley* v. *Fassett*, 144 Mo. 68. A bill filed to restrain the fraudulent imitation of a trade-mark does not complain that the defendant has infringed any right of property, but that he has imitated the plaintiff's marks for the purpose of fraudulently passing off his own goods as the plaintiff's. The practice of the court in granting or refusing an injunction is, however, substantially the same as in patent and copyright cases. Hayne's Outlines of Eq. 275–277. See *Trade-marks*.

The transfer of negotiable securities and other property obtained by fraud will be restrained; sales and conveyances be enjoined when they are likely to operate as a fraud upon third persons; and in case of a sale of trust property, purchasers be prevented, by injunction, from paying over the purchase-money, when there is danger of a misapplication of the purchase-money. *Hine* v. *Handy*, 1 Johns. Ch. 6; *Osborn* v. *Bank of U. S.*, 9 Wheat. 738; *Ferguson* v. *Fisk*, 28 Conn. 501; *Metler* v. *Metler*, 18 N. J. Eq. (3 C. E. Green) 270. See *Injunction*.

The writ of *ne exeat regno*, which is issued, as its name imports, to prevent a person from leaving the country, originated at a very early period. It was at first only employed for political objects and purposes of State, but was subsequently extended to private transactions, in which it is now chiefly used. It is applied with great caution, and usually only after the filing of a bill. It may be obtained against a foreigner temporarily here. *Gilbert* v. *Colt*, 1 Hopkins' Ch. 496. As a general rule it will not be granted except in cases of equitable claims and debts; and the demand must be certain in its nature, pecuniary, and actually due. *Porter* v. *Spencer*, 2 Johns. Ch. 169; *McDonough* v. *Gaynor*, 18 N. J. Eq. (3 C. E. Green) 249; *Rice* v. *Hale*, 5 Cush. 242; *Samuel* v. *Wiley*, 50 N. H. 353. Alimony decreed to a wife will, however, be enforced against her husband by this writ if he is about to leave the State (*Denton* v. *Denton*, 1 Johns. Ch. 364); and where, in some equitable proceeding, there is an admitted balance due from the defendant to the plaintiff, and the latter claims a larger sum, the court will issue the writ. Story's Eq. Jur., § 1471.

The writ of *supplicavit*, which is in the nature of the process at common law to find sureties of the peace, is now seldom issued. Mr. Story (Eq. Jur., § 1476) says that it is sometimes resorted to by a wife against her husband, and that the court may grant maintenance or alimony to the wife, if she is obliged to live apart from her husband. But Chancellor Kent in *Codd* v. *Codd*, 2 Johns. Ch. 141, doubted whether the writ ought now to be allowed, there being an adequate remedy at law; and the same view seems to have been recently taken by the supreme court of Massachusetts. *Adams* v. *Adams*, 100 Mass. 365.

§ 2. **When there is no adequate legal remedy.** The remedy at law must reach the whole mischief, and secure the whole right of the party in a perfect manner, or equity will interfere and give such relief (*Scott* v. *Scott*, 33 Ga. 102; *Witter* v. *Arnett*, 8 Ark. [3 Eng.] 57; *Mack* v. *Bowman*, 9 id. [4 Eng.] 501; *Jordan* v. *Faircloth*, 27 Ga. 372); and it must be as practical and efficient as the remedy in equity. *Bunce* v. *Gallagher*, 5 Blatchf. 481. Therefore, where the complainant would have been remediless at law upon one ground alone, a court of equity will entertain jurisdiction, without inquiring whether there are not other grounds which would give the court jurisdiction. *Mattingly* v *Corbit*, 7 B. Monr. 376. So, it is not enough to bar a proceeding in equity, that a judgment has been obtained against the complainant in an action at law in which the matter alleged in the bill might have been set up by way of defense. It must be shown that if so set up, it would have been as practical and efficient to the ends of justice

and its prompt administration, as the remedy in equity. *Hollingshead* v. *McKenzie*, 8 Ga. 457. And the fact that there is a remedy at law, for the protection of the complainant as to one of the equities claimed, is not a reason for dismissing a bill that contains sufficient equities to give the court jurisdiction independently of that ground. *Harper* v. *Whitehead*, 33 Ga. 138. When the matter is one in which the jurisdiction is concurrent at law and in equity, a court of equity will exercise a sound discretion in assuming it, and will only decline to do so, when the remedy at law is as complete and effectual as in equity. *Morris* v. *Thomas*, 17 Ill. 112; *Hager* v. *Shindler*, 29 Cal. 48; *Witter* v. *Arnett*, 8 Ark. 57. See Vol. 1, 150 *et seq.*

Although courts of equity are not tribunals for the collection of debts, yet they afford their aid to enable creditors to obtain payment when their legal remedies are inadequate. It is only, however, by the exhibition of facts showing that such remedies have been exhausted that the jurisdiction of equity attaches. *Webster* v. *Clark*, 25 Me. 313. The fact that there are numerous and complicated accounts will not alone be sufficient to oust a court of law of its jurisdiction. A prayer for discovery must aver that the plaintiff has not other and sufficient evidence without the discovery. Such a prayer will not be sufficient to give the court jurisdiction when it is sought in aid of the relief prayed for in the bill, unless the plaintiff shows that he is entitled to the relief in a court of equity. *Norwich & Worcester R. R. Co.* v. *Storey*, 17 Conn. 364.

Nor will a court of equity devise a remedy for the recovery of a debt merely because of a failure to recover the debt through the ordinary legal remedies. *Finagan* v. *Fernandina*, 15 Fla. 379; 21 Am. Rep. 292.

The maxim that a personal action dies with the person does not apply to cases of which courts of equity take cognizance. If a defendant commits a fraud, he will be deemed a trustee for those whom his fraud has injured, and the suit will be revived, on his death, against his personal representatives. *Schley* v. *Dixon*, 24 Ga 273.

When a court of law declines to decide a question that falls within the peculiar province of a court of equity, the party has a right to go into the latter court to raise the question. *Sims* v. *Aughtery*, 4 Strobh. 103. And the fact that the complainant commenced an action at law, which he abandoned because it would be ineffectual, is not a bar to a proceeding in equity in relation to the same matter. *McCloskey* v. *McCormick*, 44 Ill. 336.

§ 3. **When equity follows the law.** Equity follows the law in the

sense of applying to equitable estates and interests, the same rules by which, at common law, legal estates and interests of a similar kind are governed. In some cases equity follows the law implicitly; in others it assists it, and advances the remedy; but in no case does it contradict or overturn the grounds or principles of the law. *Cowper* v. *Cowper*, 2 P. Wms. 720; *Carter* v. *Jordan*, 15 Ga. 76.

It permits the rules of law and legislative enactments, and the course of law, to proceed as far as it can without sacrificing claims based upon particular circumstances which compel the court to interfere. It cannot enforce the specific performance of an agreement void by the statute of frauds, if the defendant interposes the statute, unless an equity is raised in favor of the party insisting upon performance, which cannot otherwise be satisfied. *Phillips* v. *Thompson*, 2 Johns. Ch. 418; *German* v. *Machin*, 6 Paige's Ch. 292. When the remedy in equity corresponds with a recognized legal one, the rules relating to the latter are strictly followed. But when the equitable remedy is founded wholly upon a principle of its own, and there is no corresponding relief at law, the court acts on its own rules. *Kane* v. *Bloodgood*, 7 Johns. Ch. 118; *Murray* v. *Coster*, 20 Johns. 576.

In equity, as well as at law, the plaintiff must recover on the strength of his own title. *Grand Gulf R. R., etc., Co.* v. *Bryan*, 8 Smedes & Marsh. 234. In cases of descent, the rules of law and equity agree; though cases sometimes occur in which equity will control the legal title of an heir, which would be deemed absolute at law. *Raw* v. *Pote*, 2 Vern. 239. Limitations, by which equitable estates and interests are created by executed trusts, are construed the same as similar limitations of legal estates and interests would be at law; but equity sometimes refuses to apply to executory trusts the strict rules by which legal estates are governed. *Cowper* v. *Cowper*, 2 P. Wms. 720.

Courts of equity are within the spirit, if not the words, of the statute of limitations. When the demand is of a legal nature, and might be cognizable at law, they govern themselves by the same limitations as are prescribed by the statute in regard to actions in courts of common law. *Bruen* v. *Hone*, 2 Barb. 586. In many, and perhaps most cases, they act upon the analogy of the limitations at law; while in others, they act not so much in analogy as in obedience to the statute. *Wright* v. *Leclaire*, 4 Iowa, 420.

Sometimes, however, equity grants relief notwithstanding the statute would be a bar at law; or refuses relief, although the statute would not be a bar at law. In such cases equity interposes, not by setting aside the law, but simply by decreeing what is equitable, and

preventing the rules of law from working injustice. Story's Eq. Jur., § 64. See Vol. 1, 152, 153.

§ 4. **When both parties are in the wrong.** The general rule is, that where parties are concerned in illegal agreements, or other illegal transactions, whether they are *mala prohibita*, or *mala in se*, courts o equity, following the rule of law as to participators in a common o ense, will not interpose to grant any relief; acting upon the well-known maxim *in pari delicto potior est conditio defendentis et possidentis*. *Grimes* v. *Hoyt*, 2 Jones' Eq. 271; *Mattox* v. *Hightshue*, 39 Ind. 95; *White* v. *Crew*, 16 Ga. 416; *Swartzer* v. *Gillett*, 1 Chand. 207; *Hudson* v. *Johnson*, 45 Cal. 21.

It, for instance, a person should seek to obtain the delivery up of an instrument on the ground of fraud, to which he was a party, equity would not interpose. So, if A should agree to pay B money for doing an illegal act, B could not recover the money, nor (except when the thing done is against public policy) could A obtain the surrender of the contract, or, if he had paid the money, recover it back. The general maxim does not, however, always prevail; the circumstances of the particular case sometimes requiring an exception. *Bellamy* v. *Bellamy*, 6 Fla. 62.

If the person seeking redress is not *in pari delicto* with the defendant, as in cases of usury in which the borrower is compelled by his necessities to agree to the usurious transaction, or in cases where duress or force is employed to make the plaintiff consent to the illegal act, equity will relieve; otherwise the grossest frauds would be sanctioned. The maxim must also be understood to refer only to willful misconduct respecting the matter in question, and not to misconduct, however gross, disconnected therewith. Roberts' Princ. of Eq. 22. The plaintiff must come into a court of equity with clean hands or relief will be denied to him. *Gunter* v. *Laffan*, 7 Cal. 588; *Dunning* v. *Bathrick*, 41 Ill. 425.

§ 5. **If equities equal, the law prevails.** Where a party has an equitable right to an estate, and another has an equal equitable as well as a legal right, or where two have equal equitable rights and one has possession, the latter will prevail. *Chamberlain* v. *Thompson*, 10 Conn. 243.

If the plaintiff has a claim to the protection of the court which is only equal to that of the defendant, equity will refuse to interpose. *Wortley* v. *Birkhead*, 2 Ves. 573; *Beekman* v. *Frost*, 1 Johns. Ch. 300.

It is sometimes difficult to determine what is an equal equity; though it is said to exist between persons who have been equally

innocent and equally diligent. The most obvious and familiar example is that of a *bona fide* purchaser of the legal estate for a valuable consideration without notice of the adverse title. See Vol. 1, 154, 155.

§ 6. **Prior in time, prior in right.** In mere equitable claims, where no legal right or possession interferes, priority in time generally determines the rights of the claimant. *Wing* v. *McDowell*, Walk. (Mich.) 175. If, for instance, A has an equitable claim on an estate, and afterward B, without notice of the first, obtains a similar one, the first will prevail, unless B can obtain a right at law, or possession. *Boone* v. *Chiles*, 10 Pet. 177. Chancellor KENT states the rule thus: "If there be several equitable interests, they will, if the equities are otherwise equal, attach upon it according to the periods at which they commenced." *Berry* v. *Mutual Insurance Co.*, 2 Johns. Ch. 603 Mr. Story says: "Where the title of each party is purely equitable, and the equities in other respects are equal, precedency in time will, under such circumstances, give the advantage or priority in right. *Hardin* v. *Harrington*, 11 Bush, 367; Story's Eq Jur., § 64, *d.*

If the party having the subsequent equity clothe himself with the legal title before he has notice of the prior equity, the legal title will prevail. *Baggarly* v. *Gaither*, 2 Jones' Eq 80. But where a person possessed of an equity prior in time has obtained a legal advantage, a court of equity will not deprive him of it in favor of an equity which originated subsequent to, and is not more meritorious than his, notwithstanding he had knowledge of the junior equity when he acquired the legal right. *Russell* v. *Petree*, 10 B. Monr. 184; *Ortman* v. *Dixon*, 13 Cal. 33. Although, where the equities are equal, and the junior equity in point of time gets the legal estate, a court of equity will not interfere in favor of the prior equity (*Carroll* v. *Johnston*, 2 Jones' Eq. 120); yet if the party, who has the right at law, acquires another right inconsistent with his equity, the rule "prior in time, prior in right," prevails. *Ellis* v. *Durham*, 2 Jones' Eq. 465. See Vol. 1, 155. The holder of an equitable title to lands may protect it by buying in an outstanding legal title to enable him to defeat adverse equities. *Whalen* v. *Bishop*, 58 Ill. 162.

§ 7. **Equality is equity.** This maxim is applied to contribution, abatement of legacies, the marshaling and distribution of equitable assets, and a variety of other cases. As a general rule, equitable assets are distributed in equity equally among all the creditors, without regard to the dignity or priority of the debts; and if the fund falls short, the creditors are required to abate proportionally. *Moses* v. *Burgatroyd*, 1 Johns. Ch. 130. A creditor's bill, filed by one or more creditors

against the estate of a decedent, on behalf of himself and all other creditors, for an account of assets and a settlement of the estate, is allowed, upon the principle that equality is equity, to secure a distribution of assets without preference. Where land is charged with the payment of legacies, all the legatees take *pari passu*, and if the equitable assets after the payment of the debts are insufficient to pay all the legacies, the legatees are required to abate in proportion. *Brown* v. *Brown*, 1 Keen. 275. Where the donee of a power in trust has failed to exercise his option of selecting out of a class, equity will divide the property equally among all the beneficiaries. *Burrough* v. *Philcox*, 5 Mylne & Craig, 73.

The rule of law, that when property is conveyed to two or more persons they are deemed to hold in joint tenancy unless there are words of severance making them tenants in common, is not always regarded in equity, which leans strongly against joint tenancy, in consequence of its incident survivorship. For although each tenant may thus have an equal chance of surviving and taking the whole, yet equity, in most cases, considers it as more consonant with the intention of the parties that each should have an equal certainty of an absolute share, or a share proportionate to what he has advanced. Therefore, if two persons advance money in equal or unequal portions, and take a mortgage to them jointly, and one of them dies, the survivor shall not have the whole money due on the mortgage, but the personal representatives of the deceased are entitled to a share in proportion to the amount advanced by him. *Randall* v. *Phillips*, 3 Mason, 378. And the same rule is applied when two persons jointly purchase an estate and pay for it unequally; each being deemed to hold the estate in proportion to the sum they respectively paid. *Haines* v. *Grant*, 5 Binn. 119. Real estate bought for partnership purposes, and on partnership account, is governed by a similar rule. Story's Eq. Jur., §§ 1206, 1207. See Vol. 1, 155. When two or more persons have a common interest in a security, equity will not allow one to appropriate it exclusively to himself or to impair its worth to the others. *Jackson* v. *Ludeling*, 21 Wall. 616.

§ 8. **He who seeks equity must do equity.** The court will not grant merely equitable relief, without requiring of the party asking it, to do equity himself. *Secrest* v. *McKenna*, 1 Strobh. Eq. 356; *Richardson* v. *Linney*, 7 B. Monr. 571; *Mumford* v. *American Life Ins. & Trust Co.*, 4 N. Y. (4 Comst.) 463; *Irons* v. *Reyburn*, 11 Ark 378; *Comstock* v. *Johnson*, 46 N. Y. (1 Sick.) 615. And, therefore, so long as the plaintiff's wall, laid on his own land, projects over the defendant's land, a court of equity will not compel the defendant to

desist from using it as a party-wall. *Guttenberger* v. *Woods*, 51 Cal. 523.

And so, too, one cannot successfully claim that a structure standing on his neighbor's premises is a nuisance, and procure an abatement thereof while he maintains one equally offensive on his own land. *Cassady* v. *Cavenor*, 37 Iowa, 301.

A party to an illegal contract cannot avail himself of its illegality, until he restores to the other party all that has been received from him on such illegal contract. So long as he continues to enjoy the advantages of the contract, he will not be allowed to set up its nullity. *Hunt* v. *Turner*, 9 Texas, 385. He will not be permitted to found his claim for relief upon a permission contained in a contract, while he repudiates the conditions and covenants entered into by him, and which formed the consideration upon which the permission was granted. *New York & Harlem R. R. Co.* v. *Mayor, etc., of New York*, 1 Hilt. 562. See, also, *Pujol* v. *McKinlay*, 42 Cal. 560. If he admits that a sum is due to the opposite party, equity will not aid him until he pays or offers to pay it. But the plaintiff, in a bill for an account, need not offer to pay whatever balance is found against him. *Nelson* v. *Dunn*, 15 Ala. 501.

When equity is called upon to aid a party against the operation of the statute of frauds, and the acts of one who would take an unjust advantage of it, the court scrutinizes the conduct of the party invoking its aid, and demands of him the utmost good faith and fair dealing. *Evans* v. *Folsom*, 5 Minn. 422. A contract may be void under the statute of frauds, yet if the conduct of the party setting up the invalidity of the contract has been such as to raise an equity outside of, and independent of the contract, and nothing else will be adequate satisfaction of such equity, the court will sustain the bill. *Dugan* v. *Colville*, 8 Texas, 126.

Although neither damages nor compensation will, as a rule, be decreed to a plaintiff in equity, excepting as incident to other relief, or where there is not an adequate remedy at law, or some peculiar intervening equity, yet a defendant is often allowed compensation on the ground that he who seeks equity must do equity. If, for instance, a person asks the aid of the court to enforce his title to property against an innocent party who has improved the property, while beheving himself to be the owner, such aid will only be rendered on condition that he compensate the party for his improvements. *Putnam* v. *Ritchie*, 6 Paige's Ch. 390.

A plaintiff, in order to obtain equitable relief, is not required to do equity in any other matter than that in which he seeks redress, and then

he is to do equity by restoring to the party whatsoever he may have received from him in the transaction sought to be set aside. *New York & New Haven R. R. Co.* v. *Schuyler*, 38 Barb. 534. See Vol. 1, 155, 156.

§ 9. **Equity regards as done what ought to have been done.** This maxim lies at the foundation of many of the leading doctrines of equity. It is applied in behalf of parties who have a right to the performance of something which was intended or ought to have been performed, so as virtually to place them as nearly as possible in the situation they would have been in, if it had been done at the proper time. The most common illustrations of the rule arise in the case of agreements. Where, for instance, a binding contract is entered into for the sale of real estate, the purchaser is considered the owner of the property, and the vendor the owner of the purchase-money, so that in the event of death the heir of the purchaser has a right to the estate, and to the payment of the purchase-money out of the purchaser's personal estate, and the executor of the vendor is entitled to the receipt of the purchase-money, and all loss or benefit that accrues to the estate must be borne by the purchaser. So, whenever a testator was entitled to a fund as money or land, his real and personal representatives will take it as money or as land, according as the testator would have taken it. And where a testator has expressly directed land to be sold and converted into money, equity will consider it done from the moment of the testator's death. The force of the rule is shown by those cases in which it has been held that money agreed or directed to be laid out in land, so fully becomes land, as 1st, not to be personal assets; 2d, to be subject to the courtesy of the husband, though not to the dower of the wife; 3d, to pass as land by will if subject to the real use at the time the will was made; 4th, not to pass as money by a general bequest to a legatee; but it will do so, when described as so much money to be laid out in land, or when there is a bequest of all the testator's estate in law and equity. 1 Fonb. Eq., B. 1, ch. 6, § 9, note *t;* Story's Eq. Jur., § 64, *g*. See Vol. 1, 156.

The proceeds of a policy of insurance (effected by the trustees), for a loss happening to the property during the continuance of the trust estate, and not expended for the purposes of the trust, will, on the determination of the trust estate, be regarded in equity as real property, and will belong to the owner of the reversion. *Hawes* v. *Lathrop*, 38 Cal. 493.

The doctrine is well established that money, directed to be employed in the purchase of land, and land directed to be converted into money, are to be considered and treated as the species of property into which

they are directed to be converted. *Collins* v. *Champ*, 15 B. Monr. 118; *Craig* v. *Leslie*, 3 Wheat. 564.

Equity will not only hold that to have been done which should have been done, but in proper cases will hold that which should not have been done to be still unperformed. *Monroe* v. *Buchanan*, 27 Tex. 246.

On a bill filed for the recovery of the amount of a life insurance policy withheld for a default in the payment of a premium, caused by the defendant's agent, a court of equity will compel the payment of the amount. *Southern Life Ins. Co.* v. *Kempton*, 56 Ga. 339.

§ 10. **Effect of laches.** Neither equity nor law will assist those who neglect to take care of their own rights. *Marshall* v. *Beans*, 12 Ga. 61. It is a rule that a party shall not claim a benefit, or the aid of equity, who has been guilty of *laches* in protecting his rights, unless the laches be imputable to the opposite party. *Dickerman* v. *Burgess*, 20 Ill. 266; *Stokes* v. *Lebanon & Sparta Turnpike Co.*, 6 Humph. 241; *Edings* v *Whaley*, 1 Rich. Eq. 301. But a court of equity may, in the exercise of a sound discretion, relieve a party from the consequences of his own default. The court has power to vacate a decree taken *pro confesso* even after enrollment, where a party has been deprived of his defense through surprise, mistake, accident, or the negligence of his solicitor. Accident, when the ground of application, must be such as could not have been prevented by the ordinary care or diligence of a prudent man. *Rogan* v. *Walker*, 1 Wis. 631; Vol. 1, 162, 163, 172.

Great delay of either party unexplained, in not performing the terms of a contract, or in not protecting his rights under it, or in not proceeding with diligence after his suit is instituted, will constitute such *laches* as will prevent the interference of a court of equity to enforce specific performance. *Hough* v. *Coughlan*, 41 Ill. 130; *Jamison* v. *Bay*, 13 Ark. 600; *Ridgway* v. *Wharton*, L. R., 6 H. L. Cas. 238. The plaintiff must show that he has been in no default, unless he can account for it by special circumstances; and if, through his own negligence, he cannot perform the whole on his side, he cannot compel the other party to a performance, for the reason that such performance would not be mutual. So likewise, when a man has trifled, or shown a backwardness on his part, equity will not decree a specific performance in his favor, especially if the circumstances are changed. *Hutcheson* v. *McNutt*, 1 Ohio, 14. But the fact that the defendant has suffered considerable delay to occur, which is satisfactorily accounted for, will not bar his relief. *Hamilton* v. *Quimby*, 46 Ill. 90. See *Specific Performance*

When a competent remedy or defense exists at law, the party who

neglects to use it will not be permitted to supply the omission in a court of equity, to the encouragement of useless and expensive litigation. A person holding a legal demand against an insolvent debtor is bound to show, by such proof as is reasonable and satisfactory, that without fault on his part, and after the exercise by him of due diligence, he has no means of obtaining satisfaction of his claim without the aid of the court. *Smith* v. *Pettus*, 4 Rich. Eq. 197.

A court of equity will not decline to entertain jurisdiction of a case merely upon the ground that the complainant had a perfect remedy by an action at law, when the parties have submitted themselves to the jurisdiction of the court of equity without objection. So, where the defense of an action at law was of such a character as would have given a court of equity original jurisdiction of it concurrently with the court of law, a neglect to interpose a defense at law will not deprive equity of its jurisdiction, if the defendant in equity answers to the merits of the bill, and does not rely on the judgment at law by demurrer. *Endicott* v. *Penny*, 14 Smedes & Marsh. 144. But where the complainant improperly and unnecessarily resorts to a court of equity, and the defendant neglects to object that the remedy of the complainant is at law, the court of equity may refuse to give to either party the general costs of litigation. *Bank of Utica* v. *Mersereau*, 3 Barb. Ch. 528; *Soule* v. *Corning*, 11 Paige's Ch. 412.

§ 11. **Jurisdiction once acquired is retained.** When a court of equity obtains jurisdiction for one purpose, it will not grant a part of the plaintiff's remedy, and drive him to a court of law for the balance; but will retain jurisdiction until full justice is done to all the parties concerned. *Rathbone* v. *Warren*, 10 Johns. 587; *Dorsey* v. *Reese*, 14 B. Monr. 127; *Hall* v. *English*, 47 Ga. 511; *Miami Exporting Co.* v. *U. S. Bank*, Wright, 249; *Corby* v. *Bean*, 44 Mo. 379; *DeBemer* v. *Drew*, 39 How. Pr. 466; 57 Barb. 438; *Scruggs* v. *Driver*, 37 Ala. 274, 291. Although, therefore, the plaintiff may have had an adequate remedy against the defendant for the breach of an agreement in an action for damages, yet if a court of equity acquires jurisdiction of the cause for the purpose of granting an injunction to restrain the collection of the execution, it will retain it, and grant the relief to which the complainant is entitled, in order to prevent a multiplicity of suits. *Days* v. *Taylor*, 7 Ga. 238. So, where the court has acquired jurisdiction by reason of the infringement of a patent, it will decide other matters between the parties, of which it might not otherwise have taken cognizance. *Brooks* v. *Stolley*, 3 McLean, 523. But equity will not assume jurisdiction in a case between a creditor and his principal debtor, when the latter has a sufficient remedy at law. *Heath* v. *Derry Bank*, 44 N. H

174. A party may, by supplemental petition, avail himself in a court of equity of matter that clearly belongs to a court of law, upon the principle that the court, having jurisdiction for one purpose, will retain it for all purposes, and do complete justice to all the parties. *Franklin Ins. Co.* v. *McCrea*, 4 G. Greene, 229.

Where the bill seeks discovery and relief, and discovery is made by the answer, the court will retain jurisdiction and grant the relief asked for, notwithstanding there might have been an action at law for the same cause. *Sanborn* v. *Kittredge*, 20 Vt. 632. The court, having acquired cognizance of the suit for the purpose of discovery, will retain it for the purpose of relief, in most cases of fraud, accident, and mistake. So, if it is plain that adequate relief can be given, and at the same time a multiplicity of suits be prevented, the court, having obtained jurisdiction, will give the proper relief. When, however, the subject-matter is cognizable at law only, and adequate relief can be given there — as where damages are to be ascertained, or titles to land tried, and in cases of mere trespass — although a court of equity often takes jurisdiction for discovery, or to compel the production of papers, yet the end having been attained, the party must seek his remedy at law. *Little* v. *Cooper*, 10 N. J. Eq. (2 Stockt.) 273; *Farley* v. *Farley*, 1 McCord's Ch. 506.

Although a court of equity will not entertain jurisdiction simply to give a construction to a deed or devise, that being purely a legal question, yet when a case is properly in a court of equity under some of its known and ascertained heads of jurisdiction, and a question of construction incidentally arises, the court will determine it. *Simmons* v. *Hendricks*, 8 Ired. Eq. 84.

Where a bill is filed for equitable relief, and no cause is shown for such relief, the court will, notwithstanding, sometimes grant legal relief. Although, for instance, the court declines to decree the specific performance of a contract, it may award damages to the complainant (*Duff* v. *Dorland*, 55 Barb. 481); and it will settle an account for rent due from a tenant, though such rent be recoverable in an action at law. *Boyd* v. *Hunter*, 44 Ala. 705. The fact that another suit is pending in the same court for the same matter is a good answer only when the whole of the relief sought in the second suit can be obtained in the first. *McKaig* v. *Piatt*, 34 Md. 249.

It is a general rule that where two courts have concurrent jurisdiction over the same thing, the one which is first possessed of the cause has a right to proceed with it, and cannot be restrained by any other. But if the plaintiff at law brings a suit in equity, and the defendant submits to the jurisdiction, the court of equity will proceed to do full

justice between the parties, and will restrain either of them from taking an inequitable advantage in the law court. *Nelson* v. *Hatch*, 15 Ala. 501; Vol. 1, 175.

§ 12. **Jurisdiction in equity not lost by conferring same power on courts of law.** If originally the jurisdiction has attached in equity in any class of cases, such jurisdiction is not taken away by subsequent statutes conferring upon courts of law the same power without prohibitory or restrictive words. *Aycinena* v. *Peries*, 6 Watts & Serg. 242; *Biddle* v. *Moore*, 3 Penn. St. 161; *Irick* v. *Black*, 17 N. J. Eq. (2 C. E. Green) 189; *Oliveira* v. *University*, Phil. N. C. Eq. 69; *McNab* v. *Heald*, 41 Ill. 326. Where no such words are employed, the uniform interpretation is, that such statutes confer concurrent, and not exclusive jurisdiction. *Waldron* v. *Simmons*, 28 Ala. 629; *Bright* v. *Newland*, 4 Sneed, 440; *King* v. *Payan*, 18 Ark. 583; *Crain* v. *Barnes*, 1 Md. Ch. 151; *Payne* v. *Ballard*, 23 Miss. 88; *Mitchell* v. *Otney*, id. 236; *Wells* v. *Pierce*, 27 N. H. 503. The jurisdiction now assumed by courts of law, to enforce contribution in some cases, does not affect the jurisdiction originally belonging to a court of equity. *Wayland* v. *Tucker*, 4 Gratt. 267.

CHAPTER LXII.

ESCAPE.

TITLE I.

CIVIL ACTION FOR AN ESCAPE.

ARTICLE I.

COMMITMENT TO CUSTODY.

Section 1. What is a legal commitment. "Escape in general is understood where any person who being under lawful arrest, and restrained of his liberty, either violently or privily evades such arrest and restraint, or is suffered to go at large before he is delivered by due course of law." 3 Bac. Abr. *391. The sheriff cannot be charged with an escape till he has had the debtor in his actual custody by a legal authority. *Gordon* v. *Ryan*, 1 J. J. Marsh. 56, 58. By a legal authority is meant a precept issuing from a court which has jurisdiction in the suit and over the defendant's person. The precept must be one which has no defect on its face and which has not been already served. *Ontario Bank* v. *Hallett*, 8 Cow. (N. Y.) 192; *Hutchins* v. *Edson*, 1 N. H. 139; *Hitchcock* v. *Baker*, 2 Allen (Mass.), 431. Thus, where the affidavit necessary to authorize the arrest was taken before the plaintiff's attorney, but this did not appear on the papers and was not known to the officers, the arrest was good. *Underwood* v. *Robinson*, 106 Mass. 296. But if it appears on its face to be irregular, it is no protection. *Rex* v. *Gay*, Quincy (Mass.), 91. Where the precept has already been served by a levy no arrest can be made on it. *Almy* v. *Wolcott*, 13 Mass. 75. Unless the officer is induced to abandon the levy by the debtor's fraud. *Ladrick* v. *Briggs*, 105 Mass. 508. The precept is no protection unless the court from which it issues has jurisdiction. *Odes* v. *Clerk*, 1 Ld. Raym. 397; *Lampson* v. *Landon*, 5 Day (Conn.), 596; *Custin* v. *Fitch*, 1 Root (Conn.), 288. The precept must also be directed to the officer who serves it. *Watkins* v. *West*, 2 Ld. Raym. 1530. Other errors in the proceedings which render them voidable only are immaterial. *Cushe's Case*, Cro. Eliz. 188; *Wolf* v. *Davison*,

5 Mod. 200; *Jones* v. *Cook*, 1 Cow. (N. Y.) 309. The officer is protected in cases where he may not be liable for abandoning the arrest. *Tuttle* v. *Wilson*, 24 Ill. 553. As in case of a person privileged from arrest. *Green* v. *Edson*, 2 N. H. 293; *Turlton* v. *Fisher*, 2 Doug. 671; *Ray* v. *Hogeboom*, 11 Johns. (N. Y.) 433.

§ 2. **Form of a commitment.** The sheriff cannot be charged with an escape before he has the party in his actual custody. *Whithead* v. *Keyes*, 3 Allen (Mass.), 500. To constitute actual custody, it is not necessary that the officer touch the person of his prisoner. It is enough that he has the ability to make the arrest and the present purpose to do so, and the debtor know it and submit to his authority. *Emery* v. *Chesley*, 18 N. H. 198; *Grainger* v. *Hill*, 4 Bing. N. C. 212; *Genner* v. *Sparkes*, 1 Salk. 79. Where a bailiff having a writ against a person met him on horseback and said to him, "You are my prisoner," upon which he turned back and submitted, it was a good arrest; but if he had fled, it would not have been, unless the bailiff had laid hold of him. *Homer* v. *Battyn*, Buller's N. P. 62; *Strout* v. *Gooch*, 8 Greenl. (Me.) 126; *Gold* v. *Bissell*, 1 Wend. (N. Y.) 210; *Pocock* v. *Moore*, Ry. & M. 321; *Courtoy* v. *Dozier*, 20 Ga. 369; *Mowry* v. *Chase*, 100 Mass. 85. On the other hand an arrest is complete when the officer lays his hand upon the person whom his writ directs him to arrest, although he may not succeed in stopping and holding him. *Whithead* v. *Keyes*, 3 Allen (Mass.), 500; *Genner* v. *Sparkes*, 1 Salk. 79; *Williams* v. *Jones*, Cas. temp. Hard. 321; *U. S.* v. *Benner*, Bald. 239; *Nicholl* v. *Darley*, 2 Y. & J. 398; *Sandon* v. *Jervis*, El. B. & El. 935. Where the officer at a distance said he arrested the defendant, who kept him off with a weapon and retreated into a house, it was no arrest. *Genner* v. *Sparks* 1 Salk. 79. Holt, C. J., said that if a window be open and an office, put in his hand and touch one for whom he has a warrant, he is thereby his prisoner, and the officer may break open the door. Harr. 8. After the arrest is duly made the prisoner may be temporarily released by giving bail, and the officer will not be chargeable with an escape unless he is legally surrendered to him. *Hamilton* v. *Wilson*, 1 East, 383. In case of a transfer of the custody of the prisoner from one officer to another, the first will not be released from responsibility nor the second charged with it, until the transfer is legally perfect. *Westby's Case*, Cro. Eliz. 365. Where the officer leaves the debtor at the jail without a copy of the execution, and the jailer for that reason refuses to detain him, the officer and not the jailer is responsible. *Houghton* v. *Wilson*, 10 Gray (Mass.), 365; *Kidder* v. *Barker*, 18 Vt. 454. If a man is arrested and in the actual custody of the sheriff, and afterward another writ is delivered to the sheriff, he is immediately, by

construction of law, in the sheriff's custody on the new writ, without an actual arrest, and the plaintiff may maintain an action for an escape. *Frost's Case*, 5 Co. 89; *Collins* v. *Yewens*, 10 Ad. & Ell. 570.

ARTICLE II.

WHAT IS DEEMED AN ESCAPE.

Section 1. In general. An escape is a deliverance of a person who is lawfully imprisoned, out of prison before such person is entitled to such deliverance by law. *Colby* v. *Sampson*, 5 Mass. 310; *Lowrey* v. *Barney*, 2 Chipm. (Vt.) 11. It is immaterial how short the time may be for which he is free. *Hawkins* v. *Plomer*, 2 W. Bl. 1048. But to constitute an escape there must be some agency of the prisoner employed, or some wrongful act of another against whom the law gives a remedy. *Wilckens* v. *Willet*, 4 Abb. Ct. App. 596; 1 Keyes (N. Y.), 521. Thus, where a soldier being arrested was rescued and carried away against his will by his fellow soldiers, this was held an escape. *Bargill* v. *Taylor*, 10 Mass. 206. But where the prisoner, being suddenly sick, was removed to a neighboring house, without any agency of his own, it was no escape. *Baxter* v. *Tuber*, 4 Mass. 361. Any liberty not authorized by law is an escape. *Colby* v. *Sampson*, 5 Mass. 310. Allowing him in parts of the jail not usually devoted to prisoners, for instance. *Burroughs* v. *Lowder*, 8 Mass. 373. A power to free himself, given to a prisoner, may be a constructive escape, such as intrusting him with the keys of the prison, or appointing him a turnkey. *Post*, art. 2, § 4. A removal of the prisoner from one jail to another is no escape; nor is a discharge by authority of law. *Wiles* v. *Brown*, 3 Barb. (N. Y.) 37. But if the discharge was forged, or the court had no power to issue it, it does not protect the officer. *Lownds* v. *Remsen*, 7 Wend. (N. Y.) 35; *Conyers* v. *Rhame*, 11 Rich. (S. C.) 60. Where the prisoner is discharged by order of the plaintiff it is no escape, but his subsequent assent is no protection. *Powers* v. *Wilson*, 7 Cow. (N. Y.) 274; *Hopkinson* v. *Leeds*, 78 Penn. St. 396. Where the creditor entices the prisoner away, with intent to charge the sheriff with an escape, it is a fraud, and the sheriff is excused. *Drake* v. *Chester*, 2 Conn. 473; *Van Wormer* v. *Van Voast*, 10 Wend. (N. Y.) 356; *Dexter* v. *Adams*, 2 Den. (N. Y.) 646; *Hiscocks* v. *Jones*, Mood. & M. 269. Whenever the prisoner in execution is in a different custody from that which is likely to enforce payment of the debt, it is an escape. *Benton* v. *Sutton*, 1 Bos. & P. 27; *Whittiker* v. *Riley*, 49 N. H. 145; 6 Am. Rep. 474.

The removal of an execution debtor, arrested on a *ca. sa.* sent from the sheriff of the supreme court to another county, out of the county where the arrest was consummated, constitutes an escape. *McGruder* v. *Russell*, 2 Blackf. 18.

§ 2. **How prisoner is to be kept.** Every person in prison for debt is to be kept in safe and close custody, in order to compel them the more speedily to pay their debts and make satisfaction to their creditors. 3 Bac. Abr. 398. BULLER, J., says: "Whenever the prisoner in execution is in a different custody from that which will be likely to enforce the payment of the debt, it is an escape." *Benton* v. *Sutton*, 1 Bos. & P. 24. "The very object of committing these men to jail is to put them in a place which shall not be desirable, a place of some discomfort, and to keep them there until they shall be induced to perform or make every reasonable effort to perform the sentence imposed. The sheriff and the jailer are to receive the prisoner in their custody in jail, and him there safely keep — not safely keep him somewhere else, or where they choose, or where they can most conveniently keep him, but there, in that jail." SARGENT, J., *Riley* v. *Whittaker*, 49 N. H. 148. But see *post*, at end of this section, and § 4. Coke says (3 Co. 44 a) that prisoners, if need require, may be kept in irons. But this strictness of custody is only required where the arrest is upon execution. On mesne process the sheriff may show them what indulgence he pleases, provided he has them forthcoming at the return of the writ. *Atkinson* v. *Matteson*, 2 T. R. 172. Therefore, the officer may rearrest the defendant after an escape on mesne process, while, if a prisoner on execution is let out of his custody a moment, the cannot be retaken. *Parrot* v. *Mumford*, 2 Esp. 585. Every liberty not authorized by law given to a prisoner is an escape. *Colby* v. *Sampson*, 5 Mass. 310; *Lowry* v. *Barney*, 2 D. Chip. (Vt.) 11; *Jones* v. *State*, 3 Harr. & J. (Md.) 559; *Toll* v. *Alvord*, 64 Barb. (N. Y.) 568. Thus, if the jailer was a woman, and she marries a prisoner, it is an escape, or if the jailer marries a female prisoner. Plow. 17. A deputy sheriff cannot arrest the jailer and confine him in his own jail. *Skinner* v. *White*, 9 N. H. 204. Nor can the coroner imprison the sheriff in a jail under his charge. *Day* v. *Brett*, 6 Johns. (N. Y.) 22. If the sheriff gives the prisoner the keys of the prison or appoints him a turnkey, it is an escape, although the prisoner remains. *Kellogg* v. *Gilbert*, 10 Johns. (N. Y.) 220; *Steere* v. *Field*, 2 Mason, 486. A reasonable deviation from the direct route to the prison, from compassionate motives, is proper. *Wool* v. *Turner*, 10 Johns. (N. Y.) 420. The prisoner may be permitted to occupy any apartment of the jail. *Burns* v. *Brian*, 1 Spear (S. C.), 131. Even if the jail door is open, it is no

escape if the prisoner does not leave the prison. *Currie* v. *Worthy*, 2 Jones' (N. C.) L. 104. If the prisoner be temporarily taken from jail by proper authority, as a writ of *habeas corpus*, it is no escape. *Spence* v. *Jones*, 5 Barn. & A. 705. If the officer, after the arrest, leaves the prisoner for a time in the custody of persons not authorized to detain him, it is an escape. *Palmer* v. *Hatch*, 9 Johns. 329. Permitting the prisoner to report at the jail every morning is an escape. *Hopkinson* v. *Leeds*, 78 Penn. St. 396. An officer cannot take a prisoner outside his precinct. *Boothman* v. *Surry*, 2 T. R. 5; *Hepworth* v. *Sanderson*, 8 Bing. 19; *Sherburn* v. *Beattie*, 16 N. H. 437.

A room in a tavern may be used by a sheriff to confine a person under a *ca. sa.*, it being used as a jail. *Bryson* v. *Petty*, 1 Bland's Ch. (Md.) 182, 183, note.

If a sheriff, after taking a party into custody under an execution, confines such party in his own house, as a prison, from which he escapes, the sheriff will be liable. *Jones* v. *State*, 3 Harr. & Johns. 559.

§ 3. **Removing prisoner by order of process.** As we have said, the prisoner while under arrest is still subject to the control of the courts, which may issue orders for his production before them, and the officer must obey such orders and is not liable for such obedience. Thus, every subject imprisoned is entitled to a writ of *habeas corpus*, by virtue of which he shall be brought before some magistrate and the regularity and validity of his imprisonment inquired into. But if the sheriff or other officer who has the custody of the prisoner under color of the writ, allow him to go at large, it is an escape. *Rawson* v. *Turner*, 4 Johns. 469; *Anonymous*, Cro. Car. 14.

The writ only empowers the officer to bring the prisoner directly into court, and if he gives him any liberty in the meantime it is at his peril. *Williams* v. *Lister*, Hard. 476.

Where a *habeas corpus ad testificandum* directed the jailer to bring the prisoner to Wells, and he was allowed to go sixty miles beyond, it was an escape though he returned. *Mosedell's Case*, 1 Mod. 116. See *Hassam* v. *Griffin*, 18 Johns. (N. Y.) 48.

The officer cannot take the prisoner at once out of prison on the writ and keep him out through a whole vacation (*Holroid* v. *Liddel*, 1 Ld. Raym. 241), nor carry him round about a great way for the accommodation of the prisoner without other good reason. *Mosedell's Case*, 1 Mod. 116. He must bring him in convenient time and the most convenient way, and this is to be judged of by the judges. *Anonymous*, Cro. Car. 14.

A sheriff having a defendant in execution is bound to obey a *habeas*

corpus ad testificandum, and if, in so doing, he takes his prisoner out of his county and returns him seasonably, it is no escape, and in such case he is not bound always to keep his prisoner in sight or with the same strictness as before, and if the prisoner of his own accord goes about his own business a short time out of the sheriff's view, it is no escape. *Hassam* v. *Griffin*, 18 Johns. (N. Y.) 48.

Where a sheriff, in obedience to a warrant from a commissioner of bankruptcy, brings a prisoner in execution beyond the limits of his county to be examined, he is bound to take such prisoner back within a convenient time after the examination is over, but in the meantime it is sufficient if he is accompanied and closely watched by the officer; and it is no escape that he is allowed during that time to go about with the sheriff's bailiff to several places and to dine and sleep at an inn. *Nias* v. *Davies*, 2 C. & K. 280.

As the sheriff must be careful that he does not give the prisoner more liberty than by law he ought to do when he acts in obedience to a lawful authority, so he must take care that he does not let him go at large by color of a void authority. Dyer, 297 a; *Colston* v. *Ross*, Cro. Eliz. 893; *Van Slyck* v. *Taylor*, 9 Johns. (N. Y.) 146.

A warrant from the bankruptcy court directing the prisoner to be brought before them for examination is a valid order and protects the sheriff. *Spence* v. *Jones*, 5 Barn. & A. 705.

When an officer takes a prisoner out of jail on *habeas corpus* it is no defense to an action for an escape that the prisoner was rescued by a mob or by violence, for the sheriff ought to call out the *posse comitatus* and be prepared for effective resistance. 2 Dane's Abr. 642. Thus, the sheriff was charged where the prisoner was rescued from two officers by a mob of one hundred butchers. *O'Neil* v. *Marson*, 5 Burr. 2812.

§ 4. **Constructive escapes.** The escape is actual when the prisoner in fact gets out of prison and unlawfully regains his liberty, or has obtained such a degree of freedom as is not authorized by law: a constructive escape takes place when the prisoner obtains more liberty than the law allows, though he remains still in confinement. The following are instances of constructive escapes.

The marshal of the king's bench, being sued to judgment, if he be afterward taken in execution, can be committed to no other prison but the Marshalsea, and if he is committed to that prison whereof he is keeper, without first securing the prisoners there, it will be an escape in law of all the prisoners. Style, 465.

If the sheriff gives his prisoner the keys of the prison, though he

does not go without the walls, it is an escape. *Wilkes* v. *Slaughter*, 3 Hawks (N. C.), 211.

But where a debtor, while at large within the prison limits, had been employed by the jailer to render sundry services in connection with the care of the jail, being sometimes intrusted with the keys and sometimes taking charge of the prisoners when conducted to and from the jail, but which services were rendered under the supervision of the jailer and within the prison liberties, it was no escape. *Bolton* v. *Cummings*, 25 Conn. 410.

If the sheriff appoint a prisoner turnkey of the jail, it is a voluntary escape. *Steere* v. *Field*, 2 Mas. C. C. 486.

If a woman, warden of the Fleet prison, marries her prisoner or if a sheriff marries a woman in execution with him, in either case it will be deemed a constructive escape. Plow. 17.

Where the defendant was in custody of a deputy sheriff who let him go, and at the time the sheriff held an execution against him, though ignorant of his arrest, it was held a constructive escape from the sheriff. *Wheeler* v. *Hambright*, 9 Serg. & R. (Penn.) 390.

If a prisoner is in the actual custody of the sheriff and afterward another writ against him is delivered to the sheriff, he is immediately in the sheriff's custody on the latter writ by construction of law without an actual arrest, although the sheriff may be at a distance. *Frost's Case*, 5 Co. 89; *Jackson* v. *Humphreys*, 1 Salk. 273.

In general it seems that while a mere accidental opportunity to go at large, of which he does not avail himself, is no escape (*Currie* v. *Worthy*, 2 Jones' [N. C.] L. 104), yet knowingly committing to the prisoner the power to leave the prison at his will, so that he is no longer imprisoned and restrained of his liberty, is an escape in itself. *Riley* v. *Whittiker*, 49 N. H. 149; 6 Am. Rep. 474; *Stevens* v. *Webb*, 2 Vt. 344.

There are in law but two kinds of custody, that of the officer and that of the jail. 2 Dane's Abr. 662, § 3.

Therefore, if the officer appointed the dwelling-house of the debtor as his prison and he was there confined, it was an escape. *Jones* v. *State*, 3 Harr. & J. (Md.) 559; *Palmer* v. *Hatch*, 9 Johns. (N. Y.) 329.

But at common law the sheriff might make his own house or any other place a prison. *Day* v. *Brett*, 6 Johns. (N. Y.) 22; *Bryson* v. *Petty*, 1 Bland. Ch. 182, 183, note; *Jones* v. *State*, 3 Harr. & J. 559.

A sheriff cannot be confined in the jail of which he has the custody, and if the coroner arrests him and puts him into the jail, it

is an escape. *Day* v. *Brett*, 6 Johns. (N. Y.) 22; *Skinner* v. *White*, 9 N. H. 204.

Taking the prisoner out of the officer's precinct is an escape. *Hepworth* v. *Sanderson*, 8 Bing. 19; *Boothman* v. *Surry*, 2 T. R. 5.

§ 5. **Voluntary escape.** Escapes are either voluntary or negligent. Voluntary are such as are by the express consent of the keeper, after which, if on execution, he can never retake his prisoner again (*Seymour* v. *Harvey*, 8 Conn. 70) — though the plaintiff may retake him at any time — but the sheriff must answer for the defendant. 3 Bl. Com. 415; *Butler* v. *Washburn*, 25 N. H. 258. In Phill. on Ev., Part II, chap. 3, p. 398, a voluntary escape is said to be one with the knowledge and consent, or by the default of the jailer or sheriff's officer. *Hawkins* v. *Plomer*, 2 W. Bl. 1048. Under this head must come all acts of the officer which amount, by legal construction, to escapes. See § 4. Such are delay in committing the prisoner, for the purpose of giving him more liberty than he ought, or allowing him to go in custody of one of the sheriff's followers to settle his affairs (*Benton* v. *Sutton*, 1 Bos. & P. 28); allowing him to leave the jail too soon after he has taken the poor debtor's oath (*Wells* v. *Lindsley*, 2 Root [Conn.] 481; *Bowen* v. *Huntington*, 3 Conn. 423); a release on a promise to follow the officer (*Olmstead* v. *Raymond*, 6 Johns. [N. Y.] 62); or, on the promise of a third person to pay the debt if he failed to redeliver the prisoner to the officer by a certain day. *Wheeler* v. *Bailey*, 13 Johns. (N. Y.) 366. A release on a bail-bond which proves to be forged (*Conyers* v. *Rhame*, 11 Rich. [S. C.] 60); or on a bond for the prison limits which does not conform to the statute. *Clapp* v. *Hayward*, 15 Mass. 276; *Yeates* v. *Yeaden*, 4 McCord (S. C.), 18; *Faircloth* v. *Freeman*, 10 Ga. 249; *Commonwealth* v. *Gower*, 4 Litt. (Ky.) 279. But see *Colley* v. *Morgan*, 5 Ga. 178. A release on the order of a judge which he had no authority to make. *Bush* v. *Pettibone*, 5 Barb. (N.Y.) 273; 4 N.Y. (4 Comst.) 300. But if the order was merely erroneous, it is a justification. A release by mistake is a voluntary escape. *Filewood* v. *Clement*, 6 Dowl. 508; *Ball* v. *Hagger*, 8 Mass. 429. A voluntary escape is not purged by the subsequent assent of the plaintiff. *Scott* v. *Peacock*, 1 Salk. 271; *Hopkinson* v. *Leeds*, 78 Penn. St. 396. Nor does he waive the escape, although the prisoner returns, by proceeding to judgment and execution. *Ravenscroft* v. *Eyler*, 2 Wils. 274. But where the escape was by the plaintiff's consent, a return is equal to a recaption on fresh suit. *Chambers* v. *Gambier*, Com. R. 554. If an officer who has one under arrest on an execution permits him to pass into a neighboring State, it is a voluntary escape, and he cannot retake the prisoner. *Sherburn* v. *Beattie*, 16 N. H. 437.

§ 6. **Negligent escape.** It is a negligent escape when the prisoner escapes without his keeper's knowledge or consent, and in such case upon fresh pursuit he may be retaken and the sheriff shall be excused, if he has him again before action brought against himself for escape, 3 Bl. Com. 415; *Butler* v. *Washburn*, 25 N. H. 251; *Ballou* v. *Kip*, 7 Johns. 175. As the two classes, negligent and voluntary, include all escapes for which the sheriff is liable, all not above defined as voluntary are negligent. The only excuse by which the sheriff can justify himself for not retaining his prisoner, is the act of God or the public enemy. *Fairfield* v. *Case*, 24 Wend. (N. Y.) 381; *Green* v. *Hern*, 2 Pen. & W. 167; *Wheeler* v. *Hambright*, 6 Serg. & R. (Penn.) 390; *Slemaker* v. *Marriott*, 5 Gill. & J. (Md.) 410; *Riley* v. *Whittiker*, 49 N. H. 145; 6 Am. Rep. 474; *Patten* v. *Halstead*, 1 N. J. Law, 277; *Rainey* v. *Dunning*, 2 Murph. (N. C.) 386; *State* v. *Halford*, 6 Rich. (S. C.)58; *Toll* v. *Alvord*, 64 Barb. (N. Y.) 568. A rescue of a prisoner in execution, either on the way to jail, or in the jail, or a breach of the prison, will be a negligent escape. Cro. Jac. 419. It is said that if the prison takes fire, by means whereof the prisoners escape, or if the prison is broken by the king's enemies, this shall excuse the sheriff; but if the prison is broken by rebels and traitors, the king's subjects, this shall not excuse him. 4 Co. 84. Therefore, if a mob riotously and by force demolish a jail or rescue the prisoners, it is an escape for which the sheriff is answerable. *Elliott* v. *Norfolk*, 4 T. R. 789; *Abbott* v. *Holland*, 20 Ga. 598; *Cargill* v. *Taylor*, 10 Mass. 206. Though the escape was without the knowledge of, and without any fault on the part of, the jailer, it is still a negligent escape (*Alsept* v. *Eyles*, 2 H. Bl. 108); and care is no defense for him. *State* v. *Cullen*, 50 Ind. 598. Where the prisoner gave bond and was allowed the rules of the prison whence he escaped without the jailer's knowledge, it was a negligent escape. *Bonafous* v. *Walker*, 2 T. R. 226. *Contra: Yates* v. *Yeaden*, 4 McCord (S. C.), 18; *Kepler* v. *Barker*, 13 Ohio St. 177. Where the sheriff in good faith released the prisoner on his giving a bond, which was in an amount less than twice the debt, it was held not a voluntary, but a negligent escape. *Holley* v. *Morgan*, 5 Ga. 178. The sheriff is liable for an escape on execution, though there be no jail in the county (*Gwinn* v. *Hubbard*, 3 Blackf. [Ind.] 14); or it be insufficient. *Trask* v. *Bartlett*, 3 Dane's Abr. 75; *Kepler* v. *Barker*, 13 Ohio St. 177.

§ 7. **Escape on mesne process.** The importance of the distinction which we have been considering between a voluntary and a negligent escape is found in the different results following from an escape where the prisoner is in custody on mesne process, and where he is in custody

on final process. If the sheriff arrest a debtor on mesne process and the prisoner is rescued before he is committed to jail, the sheriff may return the rescue and such return is good, and no action for the escape lies against him after such return, but the court will issue process against such rescuer or fine him; for in this case though the sheriff may, yet he is not obliged to raise the *posse comitatus*. 3 Bac. Abr. 403. On mesne process after an arrest the sheriff is obliged to admit the prisoner to bail and discharge him, and if he does not appear the sheriff is liable for an escape and must look to the bail for indemnity. 3 Bac. Abr. 404. If the officer arrests the defendant on mesne process and voluntarily lets him escape, he may arrest him again before the writ is returned, and is not guilty of false imprisonment. *Atkinson* v. *Matteson*, 2 T. R. 172. In *Riley* v. *Whittiker*, 49 N. H. 147; 6 Am. Rep. 474, it is said "there is a broad distinction between an arrest on final and one on mesne process. This difference arises from the different nature of the object to be attained and of the duty to be performed in the two cases. On mesne process the officer is to arrest the body of the defendant and have him before the court at the return day of the writ, and if he do this it is sufficient, no matter if there be an escape of the prisoner, and it is held to be immaterial whether the escape be voluntary or negligent on the part of the officer, in either case the right of recaption still exists, and the officer obeys the mandate of his writ if he has the defendant in court on the return day." *Pariente* v. *Plumbtree*, 2 B. & P. 35; *Alingham* v. *Flower*, id. 246; *Whithead* v. *Keyes*, 1 Allen (Mass.), 350: *Commonwealth* v. *Sheriff*, 1 Grant's (Penn.) Cas. 187.

§ 8. **Escape on final process.** But on final process the object is to deprive the defendant of his liberty in order that he may be induced to pay the judgment against him, and the object of the process is delayed if not defeated by an escape of any kind. *Riley* v. *Whittiker*, 49 N. H. 147; 6 Am. Rep. 474. And on final process there is held to be a distinction between a voluntary and a negligent escape. The officer who is guilty of an escape on final process, has no right to recapture the prisoner, while he may retake him in case of a negligent escape. *Butler* v. *Washburn*, 25 N. H. 258; *Clark* v. *Cleveland*, 6 Hill (N. Y.), 344; *Jackson* v. *Hampton*, 6 Ired. (N. C.) L. 34; *Commonwealth* v. *Sheriff*, 1 Grant's (Penn.) Cas. 187; *Parsons* v. *Lee*, Jeff. (Va.) 50; *Brown* v. *Getchell*, 11 Mass. 11. That the prisoner voluntarily returns after a voluntary escape is no excuse for the officer, and does not, in any manner, affect or lessen his liability. *Riley* v. *Whittiker*, 149 N. H. 49; 6 Am. Rep. 474. But if one in execution escapes and the escape is negligent, not voluntary, and the officer makes fresh

suit and retakes the debtor before an action is brought against him, this will excuse him. *Barry* v. *Mandell*, 10 Johns. 563. It is fresh suit though the prisoner has been out of sight twenty-four hours, and though he may be taken in another county. But it is not fresh suit after an action is brought. *Ridgeway's Case*, 3 Co. 52; *Stonehouse* v. *Mullins*, 2 Stra. 873; *Ball* v. *Briggs*, 1 Jones, 145. But where there has been an escape and there has been a fresh pursuit, yet if the prisoner dies before recapture the escape is not purged. *Whicker* v. *Roberts*, 10 Ired. (N. C.) L. 485; *Tanner* v. *Hallenbeck*, 4 How. Pr. 297. If the party voluntarily returns to the prison after an involuntary escape it excuses the officer, for it is equal to a recaption on fresh suit, and so also if the escape be voluntary but by assent of the plaintiff. *Chambers* v. *Gambier*, Com. R. 554; 1 Com. Dig. 605. A rescue after the prisoner is in custody on mesne process on the way to jail excuses the officer, for he must arrest the defendant wherever he meets him, and he cannot always have the *posse comitatus* with him. But a rescue after he is in jail by any but common enemies will not excuse, and so on final process, for he has the power of the county to make his jail secure. *Crompton* v. *Ward*, 1 Stra. 429; 2 Dane's Abr. 642; 3 Bac. Abr. 404.

§ 9. **What is not an escape.** The officer may grant to his prisoner such privileges and liberties as are reasonable or are expressly allowed by law. Thus, where a deputy sheriff, after the arrest, went with the prisoner two or three miles out of the direct road to the jail in order that he might obtain the means to settle the execution, and also went with him that distance to his house, for him to get his necessary clothing and see his wife before he went to jail, it was held no escape. *Wool* v. *Turner*, 10 Johns. (N. Y.) 420; *Benton* v. *Sutton*, 1 Bos. & P. 24. The sheriff is not liable for an escape made while deviating from the line of his duty at the request of the plaintiff (*State* v. *Woods*, 7 Mo. 536), nor for releasing a person who is privileged from arrest. *Green* v. *Edson*, 2 N. H. 293. If the copy of the process left with the jailer indicates that there was no power to arrest the defendant, the jailer is not liable for not detaining him. *Kidder* v. *Barker*, 18 Vt. 454; *Ellis* v. *Gree*, 1 Murph. (N. C.) 445. Where a prisoner who has given bonds for the jail limits is arrested by authority of law within the limits, as under a warrant from the legislature, and carried off the limits against his will, but returns as soon as he is set at liberty, it is no escape. *Wickelhausen* v. *Willett*, 12 Abb. Pr. (N. Y.) 319; 21 How. Pr. 40; 4 Abb. Ct. App. 596; 1 Keyes, 521. A jailer may permit a prisoner to occupy any of the apartments of the jail. *Burns* v. *Brian*, 1 Spears (S. C.), 131. *Contra: Burroughs* v. *Lowder*, 8 Mass. 373. If a debtor is visited with a sudden sickness, so extreme that he is

carried to an adjoining house beyond the limits of the jail without any agency of his own, it is no escape. *Baxter* v. *Taber*, 4 Mass. 361. Going into the jail yard in the night, for purposes indispensably necessary, when there are no accommodations within the jail, is no escape. *Partridge* v. *Emerson*, 9 Mass. 123. *Contra: McLellan* v. *Dalton*, 10 id. 190. The legislature have provided means differing in the different States by which the prisoner may obtain temporary liberty for the purpose of taking the poor debtor's oath, and the like, and in such cases, the sheriff of course is not guilty of any breach of duty in obeying the law. But he must take care that he does not let the prisoner go at large by virtue of a void authority. Dalton's Sheriff, 486; *Whitehead* v. *Varnum*, 14 Pick. (Mass.) 523; *Little* v. *Hasey*, 12 Mass. 319. 1 Stephens' N. P. 1215, says: "In general, to charge the sheriff or his officers with an escape, it must have proceeded either from connivance, or from neglect, or want of due care, and, therefore, in all cases where the sheriff or his officers are acting under proper authority and an escape happens, he is excused. Therefore, where in an action for an escape against the marshal he gave in evidence that the prisoner had been let out to bail by order of the court, it was held a good justification, for it was not done out of his own head but by command of the justices. *Vast* v. *Gawdy*, Cro. Eliz. 5; *Field* v. *Jones*, 9 East, 151.

ARTICLE III.

WHO IS LIABLE FOR AN ESCAPE.

Section 1. In general. An escape, as we have seen, is a failure, on the part of the officer charged with the custody of the prisoner, to discharge the duty which the law has imposed upon him. He thereby does an injury to the creditor who is deprived of the opportunity of coercing his debtor to payment. The creditor's remedy, then, for such wrong must be against the person upon whom the duty is imposed, and that is the officer to whose charge the prisoner is committed. But as deputy sheriffs and jailers are, in contemplation of law, only the agents of the sheriff, the action must be brought against him. *Cameron* v. *Reynolds*, Cowp. 403. See *King* v. *Orser*, 4 Duer, 431. But a voluntary escape is a tort like a rescue, for which an action lies against the subordinate as well as the superior officer. *Lane* v. *Cotton*, 1 Salk. 18. If the officer in whose custody the prisoner is, is the principal officer, as a coroner or constable, he is the only person responsible. At common law no action lies against the county for an escape, but one is given by statute in some States. By these statutes the county is required to

keep a good jail, and when the escape of any prisoner shall happen the sheriff is chargeable in the first instance, but has a remedy over against the county, if the escape happened through the insufficiency of the jail. 2 Dane's Abr. 634. In some States, by ancient custom, the plaintiff is allowed his election to proceed either against the sheriff or the under officer. *Draper* v. *Arnold*, 12 Mass. 450. Where a debtor has been committed to a State jail under process from the Federal courts, and he escapes, the marshal is not liable. *Randolph* v. *Donaldson*, 9 Cranch, 76.

§ 2. **Preceding or succeeding sheriff.** Where a new sheriff is appointed, his predecessor ought, at common law, to deliver over by indenture all the prisoners in his custody, charged with their respective executions; for the prisoners, until they are turned over to the new sheriff, remain in the custody of the old sheriff, and if he omits to deliver them over, every omission will be deemed an escape wherewith the old sheriff will be chargeable. *Partridge* v. *Westervelt*, 13 Wend. 500; *Hempstead* v. *Weed*, 20 Johns. 64; 2 Bac. Abr. 241. Thus, where A was in custody on two executions, and on a change of sheriffs only one of the executions was named in the indenture, and he afterward escaped, the old sheriffs were chargeable (*Westby's Case*, 3 Co. 71); but if the new sheriffs had had notice of the execution, it would have been otherwise. Cro. Jac. 588. But if the sheriff die in office, his successor must take notice at his peril of all persons in custody, for there is no person to inform him. 3 Co. 71. Where the prisoner had escaped during the custody of the former officer and had returned, the new officer was held chargeable for a new escape made after he received the prisoner. *Grant* v. *Southers*, 6 Mod. 183; *Lenthal* v. *Lenthal*, 2 Lev. 109; *Rawson* v. *Turner*, 4 Johns. (N. Y.) 469. But if the plaintiff sues the old sheriff for the former escape, it is an election to look to him, and is a bar to a suit against the new sheriff, notwithstanding the first voluntary escape, for when the prisoner was in prison again he was so far in custody that the plaintiff had an election, either to take him as now in execution and so charge the new officer for the last escape, or to admit him out of execution and charge the old officer. *Rawson* v. *Turner*, 4 Johns. 469, 474; *James* v. *Pierce*, 2 Lev. 132. When such election is once made and a suit brought, it will not be defeated by opposing the discharge of the prisoner from the custody of the new officer. *McElroy* v. *Mancius*, 13 Johns. (N. Y.) 121. Such opposition to the prisoner's discharge would not be an election to look to the new sheriff, where there had been an escape from the old sheriff and a return into custody, but the plaintiff was ignorant of it. *Dash* v. *Van Kleeck*, 7 Johns. (N. Y.) 477. Where the prisoner has been

removed by the old sheriff on *habeas corpus* and not delivered over to the new sheriff by indenture, the latter was held not liable for his escape. *Davidson* v. *Seymour*, Moody & M. 34. Where the old sheriff had a person in custody in a private house and would there have assigned him over to the new sheriff, who refused to accept him and the prisoner escaped, it was adjudged to be an escape in the old sheriff but not in the new, for the prisoner can only be assigned in the common jail. *Dubridgecourt* v. *Smithbrook*, Cro. Eliz. 178.

Where an execution is in the hands of a sheriff, unexecuted, at the time when he goes out of office, he ought to hand it over to his successor, whose duty it is to execute it. *Lawson* v. *Orear*, 4 Ala. 156; *Dunnica* v. *Coy*, 28 Mo. 525. Though a statute requires an outgoing sheriff to turn over process in his possession to his successor, by indenture and schedule, yet, if the latter or his deputy waives such process without that formality, the new sheriff will be liable for their proper execution. *Matthis* v. *Pollard*, 3 Ga. 1. So, in Maryland, a sheriff who receives the public jail from his predecessor, though without any deed of assignment, will be responsible from that time for the safe-keeping of the prisoners there, in the same manner as though they had been originally committed to his custody. *Slemaker* v. *Marriott*, 5 Gill & J. 406. In New York an action does not lie against a sheriff for the escape of a prisoner in execution, who was arrested by his predecessor to whom a bond was given for the liberties, although the prisoner goes at large off the liberties subsequent to the time when the new sheriff took charge of the jail of the county, if such prisoner was not assigned by the old sheriff to the new sheriff. *Partridge* v. *Westervelt*, 13 Wend. 500. See *Hinds* v. *Doubleday*, 21 id. 223.

A new sheriff is not obliged to take or detain a prisoner where the assignment by the old sheriff does not specify the writ on which the prisoner was arrested. *Richards* v. *Porter*, 7 Johns. 137. A neglect by a sheriff to deliver over to his successor unexecuted process which remains in his hands at the expiration of the term of his office, is not an official omission or neglect, such as will charge the sureties in his bond. *State* v. *Parchmen*, 3 Head, 609.

§ 3. **Sheriff will be liable for the act of his deputy.** If a jailer, who is the sheriff's servant, negligently suffers a prisoner to escape, the action must be brought against the sheriff not against the jailer, for an escape out of the jailer's custody is, by intendment of law, an escape out of the sheriff's custody. 3 Bac. Abr. 408; 2 id. *243; *Cotton* v. *Marsh*, 3 Wis. 221. So an arrest by a sheriff's officer is, in judgment of law, the same as if the arrest were by the sheriff in person, and if such officer suffer the party to escape, the action must be brought

against the sheriff. 3 Bac. Abr. 408; 5 Co. 89. All actions for a breach of duty in the office of sheriff must be brought against the high sheriff although arising from the default of the under-sheriff or sheriff's officer. *Cameron* v. *Reynolds*, Cowp. 403. In *Lane* v. *Cotton*, 1 Salk. 18, HOLT, C. J., says: "Though the master be liable yet the servant is chargeable also, but he is not chargeable as an officer but as a wrong-doer. It is upon this reason that an action lies against the jailer as well as against the sheriff, for a voluntary escape; for it is in the nature of a rescue. But for a negligent escape, the action lies only against the sheriff." But for a mere omission of duty there was no action against the deputy. *Cameron* v. *Reynolds*, Cowp. 403. To make the sheriff responsible for the acts of his deputy, they must be done in the regular course of his official business. *Stevens* v. *Colby*, 46 N. H. 163. If the creditor assumes to control the acts of the deputy and direct him as to the time and manner of performing those acts, he thereby makes him his own agent, and the sheriff is not responsible for any default caused by his obeying those directions. *Stevens* v. *Colby*, 46 N. H. 163; *Mickles* v. *Hart*, 1 Denio, 548; *Strong* v. *Bradley*, 14 Vt. 55. Where a special bailiff is appointed on the nomination of the plaintiff, the sheriff is not responsible for his default. *De Moranda* v. *Dunkin*, 4 T. R. 120; *Ford* v. *Leche*, 6 Ad. & Ell. 699. But a mere request to empower a particular person to act as bailiff is not enough. *Corbet* v. *Brown*, 6 Dow. P. C. 794. Where the officer is not under the control of the sheriff, he is not liable for his default, as where a writ comes to an officer and he makes out his mandate to the bailiff of a liberty, who takes the party and suffers him to escape, the action must be against the bailiff of the franchise and not against the sheriff. Rolle's Abr. 98, 99. So, where the warrant ran to the mayor and burgesses of W, who then had the defendant in custody. Cro. Eliz. 26. After a commitment by a United States marshal to a State jail, he is no longer responsible for the prisoner, for the jailer is not his servant. *Randolph* v. *Donaldson*, 9 Cranch, 76.

§ 4. **Liability of deputy.** The English common law, as we have just said, makes the sheriff alone responsible for the negligent acts of his deputy. And in New York, an action cannot be maintained directly against the deputy, by the party aggrieved, for a mere breach of duty in his office. *Paddock* v. *Cameron*, 8 Cow. (N. Y.) 212; Crocker's Sheriff, § 19. If the breach of duty on the part of the deputy is referable to a breach of the official duty on the part of the sheriff, he, and not the deputy, is liable for it to the party injured, but the deputy is liable to the sheriff in all such cases on his bond. *Colvin* v. *Holbrook*, 3 Barb. (N. Y.) 475; 2 N. Y. (2 Comst.) 126; *State* v. *Moore*.

19 Mo. 369; *Brayton* v. *Town*, 12 Iowa, 346; *Stevens* v. *Colby*, 46 N. H. 163; *Pond* v. *Vanderveer*, 17 Ala. 426. But in some States the deputy is also liable. Thus in *Draper* v. *Arnold*, 12 Mass. 449, it is said that "in this country the practice has been uniform for a long course of years to sue either the sheriff or his deputy for the default of the latter at the election of the injured party. By our law, deputy sheriffs are more distinctly recognized as officers of the government than in England." And the court say that they are satisfied that by the common law of Massachusetts resulting from ancient usage as well as by fair inference from their statutes, a breach of duty or neglect of it by a deputy sheriff furnishes good ground of action against him personally, whenever the party injured chooses to forego the advantage of bringing his action against the sheriff himself. *Robinson* v. *Ensign*, 6 Gray (Mass.), 304. When a deputy sheriff or a jailer commits a breach of duty in regard to his trust, the usual course is for the sheriff to resort to his bond of indemnity, and if he has omitted to take one, it would seem that the jailer is only answerable in assumpsit on his implied undertaking to serve the sheriff with diligence and fidelity. *Kain* v. *Ostrander*, 8 Johns. (N. Y.) 207. But for any positive tort or wrong, like a voluntary escape, the deputy is himself responsible to the party injured, and cannot shield himself behind the sheriff. *Lane* v. *Cotton*, 1 Salk. 18; *Smith* v. *Joiner*, 1 D. Chip. (Vt.) 62; *Remlinger* v. *Weyker*, 22 Wis. 383.

§ 5. **Remedy against party escaping.** If the sheriff suffers the prisoner to escape voluntarily, the party at whose suit he was in custody may, notwithstanding, sue out any new execution against the party escaping, for it would be unreasonable that he should be allowed to take advantage of his own wrongful act, or that the creditor should be compelled, whether he will or not, to take his remedy against the sheriff who may die or become insolvent. 3 Bac. Abr. 409; 2 id. *244. If a man in execution on a judgment be released by the jailer with the assent of the judgment creditor, the remedy against him by arrest is lost. *Welby* v. *Andrews*, Rolle's Abr. 307. And this was so where the creditor consented to a meeting with his debtor out of prison for the purpose of negotiating a settlement. Style, 117. But no subsequent assent of the creditor to an escape which has already taken place can have this effect. *Alsept* v. *Eyles*, 2 H. Bl. 108; *Hopkinson* v. *Leeds*, 78 Penn. St. 396. And not only the remedy by rearrest is lost by consent to a discharge or escape, but the creditor loses the whole benefit of the judgment and is deprived of every remedy upon it as well by action of debt (*Vigers* v. *Aldrich*, 4 Burr, 2482), or writ of execution against the goods (*Tanner* v. *Hague*, 7 Term R. 420), as by

writ of execution against the person, and he can never resort to the judgment again for the purpose of enforcing it in any manner (*Nowvell* v. *Waitt*, 121 Mass. 554), although the party in execution has been discharged on an undertaking to pay the debt by installments (*Vigers* v. *Aldrich*, 4 Burr, 2482), or to render himself on a given day (*Clark* v. *Clement*, 6 Term R. 525), or to pay the debt at a future time (*Tanner* v. *Hague*, 7 Term R. 420), and on failure thereof, that he should be liable to be taken in execution again (*Blackburn* v. *Stupart*, 2 East, 243), or discharged upon giving fresh security to satisfy the judgment which was afterward defeated through an informality (*Jaques* v. *Withy*, 1 Term R. 557); or on an agreement that on the defendants' being discharged the judgment should stand revived for twelve months. *Thompson* v. *Bristow*, Barnes, 165; *Da Costa* v. *Davis*, 1 B. & P. 242. And so of a discharge by the plaintiff of one joint defendant. *Clark* v. *Clement*, 6 Term R. 525. The creditor has his election in case of an escape without his consent, either to sue the sheriff or pursue the party escaping (*Scott* v. *Peacock*, 1 Salk. 271), or he may levy on the defendant's property; or he might pursue the three remedies simultaneously till he succeeded in one, for a suit and judgment against the sheriff, for instance, was no satisfaction, nor were the remedies inconsistent with each other. He was at liberty to pursue the remedies concurrently until he had obtained satisfaction upon one. *Jackson* v. *Bartlett*, 8 Johns. (N. Y.) 366. If the party in custody on execution or mesne process escapes, the sheriff may have an action of trespass on the case against him, for the sheriff is liable over to the plaintiff in the first action. *Lulston* v. *Offley*, Cro. Eliz. 234. So in an action against a prisoner for an escape, it was ruled that, if a sheriff voluntarily permits a prisoner to escape and he in consequence is obliged to pay the debt, he may maintain an action for money paid against the defendant, for he is discharged as against the plaintiff in the action. 2 Esp. N. P. 612. And the action was maintained by the sheriff though he has not himself been sued on the escape, for the party arrested did a wrong by the escape and the sheriff is always liable to the plaintiff in the original action, and perhaps the party escaping might die or leave the country before the sheriff was sued and so he would lose his remedy. *Norwich* v. *Bradshaw*, Cro. Eliz. 53. But the bailiff who made the arrest and from whom the escape has been made cannot have an action against the person escaping, even though the sheriff has recovered against him, for he is not chargeable to the sheriff by law, but upon his own undertaking, and, therefore, as by law no responsibility is annexed to his office, the law gives him no remedy,

for the wrong was not done to him, but to the sheriff. *Atherton* v. *Harward*, Cro. Eliz. 349.

ARTICLE IV.

ACTION FOR AN ESCAPE.

Section 1. In general. At common law the plaintiff had no remedy against a sheriff for an escape whether on mesne process or on execution except by a special action on the case. 3 Bac. Abr. 414; 2 id. *245. But by an equitable construction of Stat. Westm. 2, cap. 11, an action of debt was afterward given against sheriffs, and the plaintiff could, at his election, maintain either debt or an action upon the case for an escape on execution. Cro. Jac. 288; *Porter* v. *Sayward*, 7 Mass. 377; *Steward* v. *Kip*, 7 Johns. (N. Y.) 165. But this change does not extend to escapes on mesne process where an action on the case is still the only remedy. *Planck* v. *Anderson*, 5 Term R. 37. The action for an escape is not local but transitory. Whenever the plaintiff in an action on the case complains of the conduct of the officer as being injurious to him, he must state and prove that he has thereby sustained damage, and generally he must state and prove enough to show a good cause of action in which, to his prejudice, the tortious act, of which he complains, was committed. If the escape was on mesne process, or on a foreign judgment, the original ground of action must be proved, and if on a judgment of record, this must be stated and proved, and a legal arrest must be stated and proved. 2 Dane's Abr. 652; *Alexander* v. *Macauley*, 4 Term R. 611; *Gunter* v. *Cleyton*, 2 Lev. 85. The declaration should aver the escape of the prisoner, and likewise show that he was lawfully in custody, and how. *Brazier* v. *Jones*, 8 Barn. & C. 130. The judgment must be correctly stated and that it is in force and unsatisfied. *Edwards* v. *Lucas*, 5 Barn & C. 339; *Mill* v. *Pollon*, 7 Taunt. 271. If proved substantially as alleged, it will answer. *Stoddart* v. *Palmer*, 3 Barn. & C. 2; *Phillips* v. *Shaw*, 4 Barn. & A. 435. The plaintiff must prove, in debt against the sheriff, 1. An examined copy of the record or judgment. 2. The issuing and delivery to the defendant of the writ of *ca. sa.* 3. The arrest. 4. The escape. If the process has been returned, a copy of the writ and return will be evidence of the issuing of the process and its delivery to the sheriff. The sheriff is bound by his return both as to the fact and the time of the arrest. Stevens' N. P. 1221; *Cook* v. *Round*, 1 M. & Rob. 512. If the debtor is seen abroad after the return of the writ, it is evidence of an escape. *Fairlie* v. *Birch*, 3 Camp. 397. No action

will lie as for an escape, against the sheriff, for his officer keeping the defendant in his custody after the return of the writ, instead of taking him to prison, if the plaintiff has not been thereby delayed or prejudiced in his suit, or sustained actual damage. *Planck* v. *Anderson*, 5 Term R. 57; *Lovell* v. *Bellows*, 7 N. H. 375; *Smith* v. *Hart*, 2 Bay. (S. C.) 395; *Clark* v. *Smith*, 9 Conn. 379. If there be two sheriffs the action must be brought against both, for the two persons make but one sheriff. *Ryding* v. *Edwin*, Carth. 145. Where there are two sheriffs who suffer an escape and one dies, the action may be continued against the survivor. *Bennion* v. *Watson*, Cro. Eliz. 625. The action does not survive and no action lies at common law for an escape against the heir or representative of the sheriff. 2 Chitt. Pl. 267, n.; 2 Bac. Abr. *244; *Neal* v. *Haywood*, 1 Kelly (Ga.), 514; *Cunningham* v. *Jaques*, 4 Harr. (N. S.) 42. If the allegation is a voluntary escape, a negligent escape may be proved. *Bonafous* v. *Walker*, 2 Term R. 126; *Skinner* v. *White*, 9 N. H. 205. In case of an escape by rescue on final process, the party at whose suit the arrest was made may maintain his action either against the sheriff or against the rescuers. *Mynn* v. *Coughton*, Cro. Car. 109; *Congham's Case*, Holt. 98. And it seems that if he elected to proceed against the rescuers the sheriff would be discharged. 2 Esp. N. P. 117. The sheriff also, on a rescue from custody in jail or on final process, can maintain an action against the rescuers, for in such case the rescue does not excuse him (*May* v. *Proby*, Cro. Jac. 419; *Crompton* v. *Ward*, Str. 434), or against the defendant. *Norwich* v. *Bradshaw*, Cro. Eliz. 53.

§ 2. **Who may bring the action.** The action for a tort must in general be brought in the name of the person whose legal right has been affected, and who was legally interested at the time the injury thereto was committed, for he is the party injured by the tort, and whoever has sustained the loss is the proper person to call for compensation from the wrong-doer. 1 Chit. Pl. *69; *Pease* v. *Hubbard*, 37 Ill. 257. The person injured is, in legal meaning, the plaintiff of record in the original suit. 2 Saund. Pl. 1076. If, while the defendant be in the custody of the sheriff, in an action at the suit of A, a writ be lodged in the office of the sheriff at the suit of B, and the defendant escape, A, as well as B, may sue for the escape. *Benton* v. *Sutton*, 1 Bos. & P. 24; *Jackson* v. *Humphreys*, 1 Salk. 273. An executor can sue in his own right on a judgment obtained by him, whether in his representative character or not (*Bonafous* v. *Walker*, 2 Term R. 126), and he can support debt. *Berwick* v. *Andrews*, 2 Ld. Raym. 973. But it has been doubted whether an executor could sue for an escape on mesne process committed in the life-time of his testator,

although it seems on principle that he might. 1 Chit. Pl. *69. The nominal plaintiff in an action for mesne profits may sue for an escape on a judgment therein. The prosecutrix in bastardy cannot sue in the name of the Commonwealth for an escape. *Downing* v. *Com.*, 21 Penn. St. 215; *Doe* v. *Jones*, 2 Maule & S. 473. The hundred can sue for an escape on a judgment obtained by them. *Lauress' case*, Fitzg. 296.

§ 3. **Against whom the action may be brought.** In actions in form *ex delicto* the person committing the injury, either by himself or his agent, is, in general, to be made defendant. 1 Chitt. Pl. *87. See *ante*, art. 3. All actions for breach of duty in the office of sheriff should be brought against the high sheriff, although arising from the default of the sheriff's officer or under-sheriff. *Cameron* v. *Reynolds*, Cowp. 403. But in case of a voluntary escape, which is a willful wrong, allowed by a jailer or under-sheriff, an action will lie directly against him, for it is compared to a rescue (*Lane* v. *Cotton*, 1 Salk. 18), and an action lies against persons guilty of a rescue. *Mynn* v. *Coughton*, Cro. Car. 109; *Congham's case*, Holt. 98; *Cargill* v. *Taylor*, 10 Mass. 206; *Francis* v. *Wood*, 28 Me. 69. See art. 3, §§ 3 and 4, *ante*. The servant or deputy is not liable for his neglect but only for his misfeasance; for negligence the action lies against the principal. 12 Mod. 488.

It is against the sheriff in whose time the escape occurred that the action must be brought, although the officer continue to be the officer of the new sheriff and the new sheriff have returned the writ. *Rex* v. *Middlesex*, 4 East, 604. As already stated, the action cannot, at common law, be maintained against the heirs or representatives of the sheriff. 2 Chitty's Pl. 267, n.; *Cunningham* v. *Jaques*, 4 Harr. (N. J.) 42; *Neal* v. *Haygood*, 1 Kelly (Ga.), 514. If part only of the debt is recovered of the officer, a suit lies for the remainder against the debtor. Buller's N. P. 69.

§ 4. **Damages.** There was at common law a difference depending upon the form of action, as to the damages recoverable. For an escape on execution an action of debt was given, in which action the plaintiff recovered the whole debt, if he recovered at all. *Bonafous* v. *Walker*, 2 Term R. 129; *Alsept* v. *Eyles*, 2 H. Bl. 113; *State* v. *Hamilton*, 33 Ind. 502. But now in most, if not in all of the States, the law is changed, and the rule of damages is that in the action on the case, which was always a concurrent remedy, the jury may give less than the original debt, or even nominal damages, according to the loss the plaintiff may have really sustained by the act of the officer, or his omission, taking the ability of the debtor and all other circum

stances into view. 2 Dane's Abr. 648; *Chase* v. *Keyes*, 2 Gray (Mass.), 214. The plaintiff can charge the officer with the debt and leave him to prove that less should be recovered. *Moore* v. *Moore*, 25 Beav. 8. Thus, although the debtor was worthless, the jury were allowed to consider that his father was over 100 and rich. The measure of damages is the value of the custody of the debtor to the creditor at the time of the escape, and the jury are not limited to the consideration of the actual available means of the debtor, but may consider the value of the chances of the creditors obtaining payment by continuing such imprisonment. *Macrae* v. *Clarke*, L. R., 1 C. P. 403; *Griffin* v. *Brown*, 2 Pick. (Mass.) 304. On mesne process the creditor ought to have a sum equal to the amount his remedy is affected by the delay. *Scott* v. *Henley*, 1 Mood. & R. 227. The sheriff stands in the defendant's place and may reduce the damages by any equities which the defendant could have set up. *Evans* v. *Manero*, 9 Dow. P. C. 256. On mesne process special damages must be proved. *Planck* v. *Anderson*, 5 Term R. 37. If he can still recover his debt, the damages may be diminished accordingly. *Scott* v. *Henley*, 1 Mood. & R. 227; *Morris* v. *Robinson*, 3 Barn. & C. 206. Only actual damages can be recovered. *Russell* v. *Turner*, 7 Johns. (N. Y.) 189; *Colby* v. *Sampson*, 5 Mass. 310; *State* v. *Baden*, 11 Md. 317; *Spafford* v. *Goodell*, 3 McLean, 97; *Lovell* v. *Bellows*, 7 N. H. 375. The defendant may prove in mitigation that the debtor was unable to pay the debt (*Brooks* v. *Hoyt*, 6 Pick. [Mass.] 468; *State* v. *Lawson*, 2 Gill. [Md.] 62; *Faulkner* v. *State*, 6 Ark. 150; *State* v. *Mullin*, 50 Ind. 598); or that the plaintiff could not have recovered in the original action. *Riggs* v. *Thatcher*, 1 Me. 68. Damages may be recovered though the action was never entered (*Whithead* v. *Keyes*, 1 Allen [Mass.], 350), or never prosecuted to judgment. *Crane* v. *Stone*, 15 Kan. 94.

ARTICLE V.

DEFENSES.

Section 1. In general. In defense of the action for an escape, the sheriff may prove that the prisoner was never in his custody, because the process was void; or, he never legally arrested him; that there was no escape; that if the prisoner is out of his custody, it is by virtue of a legal authority, because he has been discharged in bankruptcy, or taken the poor debtor's oath, or because he has been discharged by the plaintiff's orders; that if he has escaped, it was under circumstances which excuse him, because he was privileged from arrest,

or because he was rescued, while under arrest on mesne process, by a mob, or on final process, by the act of God or the public enemy, or that the plaintiff has suffered no injury from the escape, because the prisoner was recaptured on fresh pursuit and is produced at the return day, or because the custody of the prisoner was of no value to the plaintiff, or that since the escape the plaintiff has barred himself of an action against the sheriff by electing a remedy against some other person, because he has sued the persons who rescued the prisoner, or because he has sued the preceding sheriff, or because he has satisfied the execution from some other source, as by a levy on real or personal property, or has discharged a joint defendant. A sheriff who releases a convict under a valid act of the legislature is not liable for an escape. *Rankin* v. *Beaird*, Breese, 163.

§ 2. **Recapture.** Whenever the jailer suffers a voluntary escape, from that moment he is a wrong-doer, and though the prisoner returns and the plaintiff proceeds to judgment against him, the jailer is still liable. *Ravenscroft* v. *Eyles*, 2 Wils. 294. In case of a voluntary escape, the jailer cannot retake the prisoner (*Seymour* v. *Harvey*, 8 Conn. 70), but the plaintiff may. *Atkinson* v. *Jameson*, 5 Term R. 25; *Butler* v. *Washburn*, 25 N. H. 251; *Jackson* v. *Hampton*, 6 Ired. (N. C.) L. 34. In case of negligent escapes, the jailer may, at any time, retake the prisoner. *Whithead* v. *Keyes*, 1 Allen (Mass.), 350; *Colley* v. *Morgan*, 5 Ga. 178. Unless, of course, he has in the meantime been discharged by the plaintiff. *Willing* v. *Goad*, Str. 909. If the prisoner has escaped on mesne process he may be retaken at any time before the return day. *Commonwealth* v. *Sheriff*, 1 Grant's (Penn.) Cas. 187. The prisoner in execution must be taken on a fresh suit to justify or to excuse the sheriff, and though he may have been out of sight even for a day and a night, yet may the capture be deemed fresh suit and the sheriff be excused, and though the prisoner may have fled into another country, yet may the sheriff there retake him on a fresh suit. *Rigeway's case*, 3 Co. 52. And where the prisoner was recaptured by a sheriff of New York in another State, the court refused to discharge him. *Lockwood* v. *Mercereau*, 6 Abb. Pr. (N. Y.) 206. So bail may retake him in another State. *Nichols* v. *Ingersoll*, 7 Johns. 145; *State* v. *Mahon*, 3 Harr. (Del.) 568. But, in Vermont, a prisoner who has escaped from custody or civil process in another State, cannot be arrested by the pursuing sheriff. *Bromley* v. *Hutchins*, 8 Vt. 194. See *Pearl* v. *Rawdin*, 5 Day, 249; *Howard* v. *Lyon*, 1 Root, 107. If a prisoner escapes, and several days after, but as soon as the sheriff has notice of it, he makes fresh suit and retakes him before any action brought, this shall excuse him. Rolle's Abr. 809; *Drake* v. *Chester*, 2

Conn. 475. But the recaption must be before action brought or it shall not be deemed fresh suit, for where it appeared that the recaption was not till after the action had been commenced, the officer was held liable. *Whiting* v. *Reynal*, Cro. Jac. 657; *Stonehouse* v. *Ewen*, Str. 873. And where the recaption was on the day on which the action was commenced, the officer was held not to be discharged, the right of action having attached to the plaintiff. *Bail* v. *Briggs*, 1 Jones (Irish), 145. If the party return after an involuntary escape and be in prison, it is tantamount to a recapture on fresh suit and will excuse the officer. *Chambers* v. *Gambier*, Com. 554; *Bonafous* v. *Walker*, 2 Term R. 126. But a fresh suit is no excuse, unless the prisoner be retaken; and where the defendant died before recapture, the sheriff was still holden. *Whicker* v. *Roberts*, 10 Ired. (N. C.) L. 485. The sheriff is authorized to use all necessary force to recapture a prisoner as well as to prevent an escape. *Henry* v. *Lowell*, 16 Barb. (N. Y.) 268. And he may be held liable for an escape, though he used all such exertions as he deemed necessary at the time to prevent it, if the jury find that he ought to have used more. *Whithead* v. *Keyes*, 3 Allen (Mass.), 495. A recapture is no defense unless the prisoner is held. *Griffin* v. *Brown*, 2 Pick. (Mass.) 308. After a negligent escape the prisoner may be retaken on Sunday. Steph. N. P. *2020.

§ 3. **Void process of commitment.** As we have already said (art. 1, *ante*), the sheriff can only be charged where there has been an arrest on valid process. The process may be defective either because the court from which it issues had no jurisdiction of the subject-matter, or because some condition precedent to its issue had not been complied with. If the court have not jurisdiction of the cause, the whole proceeding being *coram non judice*, every thing done under it is void, and the officer is liable to the defendant, not to the plaintiff. *Nichols* v. *Walker*, Cro. Car. 395; *Brown* v. *Brompton*, 8 Term R. 424; *Jones* v. *Cook*, 1 Cow. (N. Y.) 309; *Howard* v. *Crawford*, 15 Ga. 423; *Carpenter* v. *Willett*, 31 N. Y. (4 Tiff.) 90. Where the statute granting the power to arrest has not been complied with, the officer may be protected by the process and yet not be liable for an escape. *Tuttle* v. *Wilson*, 24 Ill. 553. Thus, where the affidavit and order authorized the arrest of "defendant," and there were two defendants, the arrest was void, and the sheriff not liable. *Hitchcock* v. *Baker*, 2 Allen (Mass.), 431. So if the execution is not under seal when by law it is required to be. *Hutchins* v. *Edson*, 1 N. H. 139. A paper not running in the name of the State, nor directed to any ministerial officer, nor purporting to be signed by a justice of the peace, will not justify an arrest, nor be the foundation of an escape. *Ellis* v. *Gee*, 1 Murph. (N. C.) 445. The officer is not

bound to look beyond the papers given him, and, therefore, a jailer will not be liable for not detaining a debtor who is committed on what appears to be a writ of summons (*Kidder* v. *Barker*, 18 Vt. 454); nor when the prisoner is left at the jail without the copy of the execution required by law. *Houghton* v. *Wilson*, 10 Gray (Mass.), 365. In *Carpenter* v. *Willet*, 1 Abb. Ct. App. Dec. (N. Y.) 312; 1 Keyes, 510; 31 N. Y. (4 Tiff.) 90, the reason that no action lies where the process is void, is stated to be that in such case the plaintiff has no just ground of complaint.

§ 4. **Irregular process.** There is a distinction made in favor of process, not void, but erroneous. Where it is erroneous or irregular only, the sheriff cannot take advantage of the defect, but is equally liable as if it were regular. *Shirley* v. *Wright*, 1 Salk. 273; *Burton* v. *Eyre*, Cro. Jac. 289; *Howard* v. *Crawford*, 15 Ga. 423; *Hutchinson* v. *Brand*, 9 N. Y. (5 Seld.) 208; 6 How. 75; *Jones* v. *Cook*, 1 Cow. 309. But such defect must not appear on the face of the process. *Spafford* v. *Goodell*, 3 McLean, 97; *Bensel* v. *Lynch*, 2 Rob. (N. Y.) 448; *Ginochio* v. *Orser*, 1 Abb. Pr. (N. Y.) 433; *Parker* v. *Hotchkiss*, 25 Conn. 321. For it is only parties to the suit who can take advantage of such errors, and they only by proper proceedings to have them corrected, and until such proceedings are had the process is valid. *Burton* v. *Eyre*, Cro. Jac. 289. Thus, on a recognizance in chancery, the conusee having sued out execution by which the conusor was arrested and he escaped, it was adjudged that though the execution was erroneously awarded, yet that while it continued unreversed, it was a good execution for the party, and the sheriff was liable. *Conier's Case*, Cro. Eliz. 576; *Weaver* v. *Clifford*, Cro. Jac. 3. So, the sheriff was liable where the execution issued after a year from the judgment without a *scire facias*, for the process, though erroneous, is not void. Cro. Eliz. 188. And generally, wherever the officer has a writ which will justify an arrest and imprisonment of the defendant, and he lets him go at large, it is an escape. 2 Dane's Abr. 626. But in *Tuttle* v. *Wilson*, 24 Ill. 553, the court limit this and say that the rule that a ministerial officer is protected by the writ of a competent court, good on its face, is a rule of protection merely and personal to the officer. In an action for an escape, the sheriff may show that the process was void, or that the defendant was privileged from arrest. *Ginochio* v. *Orser*, 1 Abb. Pr. 433. And no action lies for an escape where the arrest was made upon void process. *Carpenter* v. *Willett*, 1 Abb. Ct. App. 312; 1 Keyes, 510; 31 N. Y. (4 Tiff.) 90; 6 Bosw. 25; *Albee* v. *Ward*, 8 Mass. 79; *Contant* v. *Chapman*, 2 Q. B. 771; 6 Jur. 666; 2 Gale & Dav. 191.

§ 5. **Discharge by order of court.** If the prisoner is ordered to

be set free by a court of competent authority the sheriff is justified in enlarging him. As for instance, that the officer discharged the prisoner by virtue of an order of the insolvent debtors' court, and he need not show that the proceedings on which the order was grounded were properly taken. *Saffery* v. *Jones*, 2 Barn. & Adol. 598. A discharge by act of law of one of several defendants taken upon a joint execution, will not operate as a discharge of the others, as a discharge by the plaintiff would. *Clark* v. *Clement*, 6 T. R. 525; *Nadin* v. *Battie*, 5 East, 147. But where the court which attempted to order the discharge had no jurisdiction to do so, the order was void and the sheriff was liable if he obeyed it. *Brown* v. *Brompton*, 8 Term R. 424. Where magistrates attempted to administer the poor debtors' oath to a prisoner, but administered the wrong oath and gave him a certificate, it was held that though it might protect the jailer from an action for the escape, it could not save the debtor from his bond. *Little* v. *Hasey*, 12 Mass. 319. An erroneous decision of a commissioner discharging a prisoner on *habeas corpus* is a justification to the sheriff in discharging him. *Wiles* v. *Brown*, 3 Barb. (N. Y.) 37. So, of a release by order of court although such order was unauthorized. *Bender* v. *Graham*, Minor (Ala.), 269. But it is said in *Bush* v. *Pettibone*, 5 Barb. (N. Y.) 273; 4 N. Y. (4 Comst.) 300, that the order must be one which the judge was authorized to make. *Van Slyck* v. *Taylor*, 9 Johns. (N. Y.) 146. The same rule applies in case of an order of discharge as in an order of arrest, that the officer is not bound to look beyond his process, if issued by a competent court. Where a prisoner is brought before a court by its order the sheriff is no longer responsible for his custody, unless he is remanded. *Barth* v. *Blise*, 12 Wall. 400; *Com.* v. *Reed*, 3 Bush (Ky.), 516. Where a prisoner was taken before a criminal court on *habeas corpus* and committed for want of bail, the sheriff's charge over him and responsibility for him ceased. *Contant* v. *Chapman*, 2 Q. B. 771. Where the prisoner, being allowed the liberties of the jail, was arrested on a criminal charge and taken to another county, it was held an escape. *Brown* v. *Tracy*, 9 How. Pr. (N. Y.) 93.

§ 6. **Rescue.** If the sheriff arrest one on mesne process and he is rescued in going to jail, this excuses the sheriff; but if the party arrested be once within the walls of the prison, a rescue thence by any but common enemies will not excuse him. The officer is obliged to arrest a defendant if he meet him, and is directed to do it, and he cannot, then, always have the *posse comitatus* with him; but otherwise when he moves the prisoner on *habeas corpus;* here, as on final process, he has time to have the *posse* if necessary; so, a rescue in these cases is no excuse and the officer is liable to the plaintiff. 2 Dane's Abr. 642;

Alsept v. *Eyles*, 2 H. Bl. 113; *Elliott* v. *Norfolk*, 4 Term R. 789; *O'Neil* v. *Marson*, 5 Burr. 2812; *Abbott* v. *Holland*, 20 Ga. 598; *Cargill* v. *Taylor*, 10 Mass. 206; *Buckminster* v. *Applebee*, 8 N. H. 546. A rescue on mesne process is no defense, if it took place after a recapture of the prisoner who had escaped, for a recapture amounts to nothing, unless the prisoner is held. *Griffin* v. *Brown*, 2 Pick. (Mass.) 309. In every case in which the rescue would not justify the officer he is allowed an action against the rescuers. *May* v. *Proby*, Cro. Jac. 419; *Crompton* v. *Ward*, Str. 434. As we have said, if the prisoner is once within the jail a rescue is no defense. Thus, where a prisoner was being taken before the court on *habeas corpus* by two officers and was rescued by one hundred butchers, the sheriff was not excused. *O'Neil* v. *Marson*, 5 Burr. 2812; *Abbott* v. *Holland*, 30 Ga. 598. In the case of a rescue the party at whose suit the arrest was made can maintain his action either against the sheriff or against the rescuers. If, therefore, he elects to proceed against the rescuers, it seems that the sheriff is discharged. *Mynn* v. *Coughton*, Cro. Car. 109; *Buckminster* v. *Applebee*, 8 N. H. 548. The sheriff should return the rescue upon his process, and such return will be *prima facie* evidence in his favor in a suit for the escape; but it may be contradicted. *Whithead* v. *Keyes*, 3 Allen (Mass.), 498; *Barrett* v. *Copeland*, 18 Vt. 67; *Jackson* v. *Hill*, 10 Ad. & Ell. 492; *Francis* v. *Wood*, 28 Me. 69. Though an officer has authority, yet he is not bound to call for aid in the service of mesne process, and is not liable for an escape which might have been prevented by his calling for aid, if the party arrested by him rescues himself, or is rescued by others. *Whithead* v. *Keyes*, 3 Allen (Mass.), 500. In an action for a rescue on mesne process, the plaintiff must prove his debt. *Law* v. *Atwater*, 2 Root (Conn.), 72. It is not necessary to prove a return of the writ. *Worthington* v. *Filthy*, 2 Harr. & M. (Md.) 91; *Whithead* v. *Keyes*, 1 Allen (Mass.), 350. An arrest on criminal process of a prisoner in execution and his removal upon the warrant is not a rescue which will excuse the sheriff. *Brown* v. *Tracy*, 9 How. Pr. (N. Y.) 93.

§ 7. **Bonds for prison bounds or jail limits.** Prisoners are allowed to obtain a temporary liberty under certain conditions, which depend upon the statutes of the different States. Thus, in England, prisoners were granted "day rules," under which they were allowed to go to consult their counsel. 2 Bac. Abr. 238. They also became entitled, on giving security, to be allowed the liberty of the "rules of the prison," which were, to all intents, the same as the walls of the prison (*Bonafous* v. *Walker*, 2 Term R. 126), and an escape from such rules was held negligent, not voluntary. The bond given for the liberty of the rules or yard must conform to the law. Thus, where it was approved by

only one justice of the peace when two were required, it was held that any liberty granted under it was an escape. *Whitehead* v. *Varnum*, 14 Pick. (Mass.) 523. In *Tappan* v. *Bellows*, 1 N. H. 109, it was held that the sheriff was liable for an escape, in case the bond was not substantially in the form prescribed by the statute, or the sureties were actually insufficient, unless they have been approved as provided by the statute. To admit a prisoner to the liberties of the prison, except in cases provided by law, is an escape. *Leonard* v. *Hoit*, Brayt. (Vt.) 73. After such bond is given it is an indemnity between the sheriff and the prisoner, and does not release the sheriff from liability for an escape if the prisoner exceeds the liberty allowed him. *Yates* v. *Yeaden*, 4 McCord (S. C.), 18. Thus, the misinstruction of the sheriff as to the limits of the yard does not excuse an escape (*Call* v. *Hagger*, 8 Mass. 423); so if a prisoner go beyond the liberties knowingly and voluntarily, on pretense of avoiding a snow bank which obstructed his usual walk. *Bissell* v. *Kip*, 5 Johns. (N. Y.) 89. But a prisoner is not guilty of an escape by rendering himself at a place beyond the limits for the purpose of taking the poor debtor's oath (*Commonwealth* v. *Alden*, 14 Mass. 388); nor where he is carried beyond the limits against his will by authority of law and returns as soon as he can (*Wilckens* v. *Willett*, 4 Abb. Ct. App. 596; 1 Keyes, 521; 12 Abb. Pr. [N. Y.] 319); nor where he is taken with a sudden sickness and carried, without his own agency, without the bounds. *Baxter* v. *Taber*, 4 Mass. 361. The sheriff must satisfy himself at his peril that the bail bond is sufficient in form and is not forged. *Conyers* v. *Rhame*, 11 Rich. (S. C.) 60; *Faircloth* v. *Freeman*, 10 Ga. 249; *Tappan* v. *Bellows*, 1 N. H. 109. The debtor is restricted to the limits fixed by law for the time being, and is guilty of an escape if he transgress them, though he keep within those established at the time he gave the bond. *Reed* v. *Fullum*, 2 Pick. (Mass.) 158. Where the limits were the boundaries of the county, a division of the county does not change them. *Kent* v. *Burnett*, 10 Ohio, 392. An extension of the limits of a muncipality does not affect the jail limits, without a special provision upon the subject. *Chamberlain* v. *Campbell*, 39 Barb. 642. A bond for the prison limits given by a prisoner in execution, who had permission from the plaintiff to go where he pleased, does not revive the judgment so that an action can be maintained for his escape. *Poucher* v. *Holley*, 3 Wend. (N. Y.) 184. After the execution of a bond for the debtor's liberties, the sheriff is not liable, if the debtor escapes. *Palmer* v. *Sawtell*, 3 Me. 447.

CHAPTER LXIII.

EXECUTORS AND ADMINISTRATORS.

ARTICLE I.

OF ACTIONS BY EXECUTORS AND ADMINISTRATORS.

Section 1. In general. According to the old common-law authorities, "an executor stands in the place of his testator, and represents him as to all his personal contracts, and, therefore, may regularly maintain any action in his right, which he himself might." Bac. Abr., Executors (N). Thus, those authorities uniformly hold, that the representative may sue, not only for all debts due to the deceased, by specialty or otherwise, but for all covenants, and indeed all contracts with the testator or intestate, broken in his life-time. See *Mason* v. *Dixon*, W. Jones, 173; *Morley* v. *Polhill*, 2 Ventr. 56; S. C., 3 Salk. 109, pl. 10; *Lucy* v. *Levington*, 2 Lev. 26; *Pinchon's case*, 9 Rep. 89 a. And the reason appears to be, that these are choses in action, and are parcel of the personal estate, in respect of which the executor or administrator represents the person of the testator, and is in law the testator's assignee. Id.; *Raymond* v. *Fitch*, 2 Cr. M. & R. 588, 596; S. C., 5 Tyrwh. 985. And it is said that this right does not depend upon the equity of an early statute, but is a common-law right, as much as the right to sue on a bond or specialty for a sum certain due in the testator's life-time. Id. But the rule that the executor may sue upon every covenant with his testator, broken in his life-time, has been qualified by later decisions; and it is held, that, where there are covenants real, that is, which run with the land and descend to the heir, though there may have been a formal breach in the ancestor's life-time, yet, if the substantial damage has taken place since his death, the real representative, and not the personal, is the proper plaintiff. Id.; *King* v. *Jones*, 5 Taunt. 418; S. C., 1 Marsh. 107; *Kingdon* v. *Nottle*, 1 M. & S. 355; 4 id. 53; Vol. 2, 358. So, it was held, that an administrator cannot have an action for breach of promise of marriage to his intestate, where no special damage is alleged (*Chamberlain* v. *Williamson*, 2 M. & S. 408; *Beckham* v. *Drake*, 8 Mees. & W. 854); and the same rule

is applied to actions for negligence or want of skill. Id.; *Knights* v. *Quarles*, 2 Brod. & B. 104. And, in general, it was a principle of the common law, that where the cause of action was founded upon any malfeasance or misfeasance, or, in other words, was a *tort*, or arose, *ex delicto*, it died with the person, and did not survive to the representative. See *Perkinson* v. *Gilford*, Cro. Car. 540; *Kinsey* v. *Heyward*, 1 Ld. Raym. 433; *Berwick* v. *Andrews*, 2 id. 974; 1 Wms. Saund. 216 a, note. But this principle has been changed by statutes in England and in this country; and, as will be seen in subsequent sections, an executor or administrator may now bring a personal action for injuries done to the testator or intestate during his life-time.

In general, an executor or administrator is deemed to possess the same rights as the testator or intestate, and no more; but, according to a Pennsylvania decision, it would seem that in some cases he has greater rights. Thus, it is held, that, although he who parts with his property to defraud creditors cannot recover it, yet, after death, if his estate be otherwise insufficient to pay his debts, the action of *trover* survives to his representatives, who may prosecute it for the benefit of the creditors. *Stewart* v. *Kearney*, 6 Watts (Penn.), 453. And see *Cooley* v. *Brown*, 30 Iowa, 470.

§ 2. **Of foreign executors, etc.** As a general rule, executors and administrators have no authority beyond the limits of the State or country where such authority is granted (*Smith* v. *Guild*, 34 Me. 443; *Gilman* v. *Gilman*, 54 id. 453; *Parsons* v. *Lyman*, 20 N. Y. [6 Smith] 103; *Mason* v. *Nutt*, 19 La. Ann. 41; *Naylor* v. *Moffatt*, 29 Mo. 126; *Vaughn* v. *Barret*, 5 Vt. 333; *Harper* v. *Butler*, 2 Pet. [U. S.] 239; *Reynold* v. *Torrance*, 2 Brev. [Sc.] 59; *Sheldon* v. *Rice*, 30 Mich. 296; 18 Am. Rep. 136; *Riley* v. *Mosely*, 44 Miss. 37); and they cannot therefore, bring or maintain suits in their official capacity, in any other State or country. *Bell* v. *Nichols*, 38 Ala. 678; *Swearingen* v. *Morris*, 14 Ohio St. 429; *Doe* v. *McFarland*, 9 Cranch, 151; *Smith* v. *Webb*, 1 Barb. 231; *Vermilya* v. *Beatty*, 6 id. 431; *Silver* v. *Stein*, 9 Eng. Law & Eq. 216; *Beaman* v. *Elliot*, 10 Cush. 172; *Davis* v. *Phillips*, 32 Tex. 564; *Dodge* v. *Wetmore*, Brayt. (Vt.) 92. But they may maintain an action on a judgment recovered in another State, for on that they need not sue in their official capacity. *Talmage* v. *Chapel*, 16 Mass. 71; *Barton* v. *Higgins*, 41 Md. 539; *Nichols* v. *Smith*, 7 Hun (N. Y.), 580. So, generally, the rule as above stated applies only to suits for debts due to the testator, and does not prevent a foreign executor from suing in the courts of another State, upon a contract made with himself as such executor. *Lawrence* v. *Lawrence* 3 Barb. Ch. 71; *Trotter* v. *White*, 18 Miss. 607; *Barrett* v. *Barrett*, 8 Me. 346. There may also be

administration granted in a State or country where the assets are locally situate, which will be regarded as ancillary to the principal administration granted in the jurisdiction where the deceased dwelt (*Holmes* v. *Remsen*, 20 Johns. 229, 265; *Dickinson* v. *McCraw*, 4 Rand. [Va.] 158; *Harrison* v. *Mahorner*, 14 Ala. 829; *Dangerfield* v. *Thurston*, 10 Mart. [La.] 232); but such ancillary administration is not usually granted until an administrator is appointed in the place where the deceased had his domicile. *Stevens* v. *Gaylord*, 11 Mass. 255. See, also, *Hobart* v. *Conn. Turnpike Co.*, 15 Conn. 145; *Shultz* v. *Pulver*, 3 Paige, 132; S. C. affirmed, 11 Wend. 363; *Aspden* v. *Nixon*, 4 How. (U. S.) 467; *McLean* v. *Meek*, 18 id. 16; *Low* v. *Bartlett*, 8 Allen, 259; *Churchill* v. *Boyden*, 17 Vt. 319; *Despard* v. *Churchill*, 53 N. Y. (8 Sick.) 192; *Hartnett* v. *Wandell*, 60 N. Y. (15 Sick.) 346. A foreign executor or administrator has a right to sue for assets belonging to the testator's estate, in the courts of Alabama, without qualifying as executor or administrator in that State (*Bell* v. *Nichols*, 38 Ala. 678); and the same is true in Pennsylvania. *Moore* v. *Fields*, 42 Penn. St. 467. So, if a foreign executor or administrator has reduced the personal property of the deceased into his own possession, and has thus acquired the legal title thereto according to the laws of that country, and the property should afterward be found in another country, or be carried away and converted there against his will, he may maintain an action for it in the latter country in his own name and right personally, without describing himself as executor or administrator, or procuring new authority as such. *Adams* v. *Cheverel*, Cro. Jac. 113. And see *Slack* v. *Walcott*, 3 Mas. (C. C.) 508; *Bollard* v. *Spencer*, 7 Term R. 358; *Commonwealth* v. *Griffith*, 2 Pick. 11.

It is not because the executor or administrator has no right to the assets of the deceased, existing in another country, that he is refused a standing in the courts of such country, for his title to such assets, though conferred by the law of the domicile of the deceased, is recognized everywhere. And if the debtors of the deceased will voluntarily pay what they owe to the foreign executor, such payment will discharge the debts, and the moneys so collected will be subject to the administration of such foreign executor. *Parsons* v. *Lyman*, 20 N. Y. (6 Smith) 103; *Doolittle* v. *Lewis*, 7 Johns. Ch. 49; *Stevens* v. *Gaylord*, 11 Mass. 256. So, it is held that the assignee of a foreign executor can maintain an action in the courts of New York State, on a chose in action transferred to him by such an executor, although the latter could not bring such an action in his representative capacity. *Petersen* v. *Chemical Bank*, 32 N. Y. (5 Tiff.) 21. And see *Leake* v. *Gilchrist*, 2 Dev. (N. C.) Law, 73.

§ 3. **Of public administrators, etc.** It has been held, that a public administrator has no authority to prosecute a suit commenced by an administrator who has deceased, until he has given a bond and taken out letters of administration in the case of that particular estate. *Thomas* v. *Adams*, 10 Ill. 319.

But it is held by the court in California, that a public administrator, having administration of an estate, continues such administration after the expiration of his term of office, and until his authority is directly set aside or indirectly revoked by another appointment. *Rogers* v. *Hoberlein*, 11 Cal. 120. And the same has been decided in Georgia. *Beale* v. *Hall*, 22 Ga. 431. See, also, *Abel* v. *Love*, 17 Cal. 233.

§ 4. **Executor and administrator's right to sue.** See *ante*, § 1. It is now a well-settled rule of law, that on a cause of action accruing after the decedent's death, his executor or administrator may sue, either in his own individual name, or in his representative capacity, at his option. *Mowry* v. *Adams*, 14 Mass. 327; *James* v. *Johnson*, 44 Ala. 629; *Merritt* v. *Seaman*, 6 Barb. 330; *Knox* v. *Bigelow*, 15 Wis. 415. But where the right of action accrued to the testator or intestate in his life-time, or to the executor or administrator after the death of the testator or intestate, either upon a contract express or implied, made with the testator or intestate, or for an injury done to the property of the testator or intestate in his life-time, the executor or administrator must sue in his representative character. *Patchen* v. *Wilson*, 4 Hill, 57; *Stewart* v. *Richey*, 2 Harr. (N. J.) 164; *Carter* v. *Estes*, 11 Rich. (S. C.) 363; *Sheldon* v. *Hoy*, 11 How. 11. An executor may sue in his own name upon a note payable to the bearer, which he holds as executor. *Lyon* v. *Marshall*, 11 Barb. 241; *Brooks* v. *Floyd*, 2 McCord (S. C.), 364; *Sanford* v. *McCreedy*, 28 Wis. 103. And if an executor change the nature of the debt, originally due to the intestate, by a contract made with himself, he must sue for the new debt in his own name, and not in his representative character. *Helm* v. *Van Vleet*, 1 Blackf. (Ind.) 342. An executor or administrator may sue in his own name to recover the price of personal property sold by him belonging to the estate of the deceased. *Aiken* v. *Bridgman*, 37 Vt. 249; *Laycock* v. *Oleson*, 60 Ill. 30; *Gunn* v. *Hodge*, 32 Miss. 319; *Goodman* v. *Walker*, 30 Ala. 482. So, where a note is indorsed to an administrator as such, he may maintain an action thereon in his own name. *Evans* v. *Gordon*, 8 Port. (Ala.) 142. And an administrator *de bonis non* may sue in his own name, as such, on a note given to his predecessor, as administrator. *Burrus* v. *Roulhac*, 2 Bush (Ky.), 39; *Barron* v. *Vandvert*, 13 Ala. 232. But it is held that an administrator *de bonis non* cannot bring suit in his own name for the price of

goods of his intestate, sold by a previous administrator. *Calder* v. *Pyfer*, 2 Cranch (C. C.), 430. Nor can he maintain a suit against the former administrator or his sureties for a *devastavit*, nor to revise the accounts of the former administrator. *Johnson* v. *Hogan*, 37 Tex. 77; *Beall* v. *New Mexico*, 16 Wall. (U. S.) 535. The administrator *de bonis non* has to do only with the goods of the intestate unadministered. If any such remain in the hands of the discharged administrator, or his representatives, in specie, he may sue for them either directly or on the bond. Id.; *Byrd* v. *Holloway*, 14 Miss. 323; *Harney* v. *Dutcher*, 15 Mo. 89; *Patterson* v. *Bell*, 25 Iowa, 149.

§ 5. **Upon what claims or demands.** The nature of the claims or demands for which the personal representative of the deceased may sue, appears to some extent in the preceding section. To this it may be added, in general, that a suit at law, or in equity, to recover the personal assets of an estate, must be brought by the personal representative. *Webster* v. *Tibbits*, 19 Wis. 438; *Linsenbigler* v. *Gourley*, 56 Penn. St. 166; *Pope* v. *Boyd*, 22 Ark. 535; *Snow* v. *Snow*, 49 Me. 159; *Cheely* v. *Wells*, 33 Mo. 106; *Brunk* v. *Means*, 11 B. Monr. (Ky.) 214. The executor, and not the devisee, is the proper party to collect a debt, due their testator, for services rendered by him in his life-time. *Ketchum* v. *Dew*, 7 Coldw. (Tenn.) 532. And a person was held liable to an administratrix for profits made in a business carried on with property belonging to the estate of the intestate, after his death, although under a contract made before her appointment. *Brown* v. *Lewis*, 9 R. I. 497. So, the legal representative of an intestate estate is the only party who can recover money due on a policy of insurance upon the life of the intestate. *Lee* v. *Chase*, 58 Me. 432. See *Rogers* v. *Bottsford*, 44 Ga. 652.

§ 6. **For injury to real property.** By the common law, the personal representative, whether executor or administrator, takes no interest in the real estate of the deceased person, and the right to the possession, therefore, belongs to the heirs or devisees, and they only are the proper parties to sue for an injury to it. *Aubuchon* v. *Lory*, 23 Mo. 99; *Floyd* v. *Herring*, 64 N. C. 409. It is upon this principle that executors and administrators, as such, are not allowed to maintain actions of ejectment. Id. And see *Emeric* v. *Penniman*, 26 Cal. 119; *Brown* v. *Strickland*, 32 Me. 174. And it is held that an action on the case, by an executor, will not lie, for overflowing and drowning the testator's land, in his life-time. *M'Laughlin* v. *Dorsey*, 1 Harr. & McH. (Md.) 224; *Chalk* v. *McAlily*, 10 Rich. (S. C.) 92. But see *contra*, *Howcott* v. *Warren*, 7 Ired. (N. C.) Law, 20. And in *Kennerly* v. *Wilson*, 1 Md. 102, it is held that an action of trespass, *quare*

clausum fregit, will lie by an executor for a trespass on real estate committed in the life of the testator. And in Alabama, an administrator may maintain ejectment for the lands of his intestate. *Russell* v. *Erwin*, 41 Ala. 292; *Golding* v. *Golding*, 24 id. 122. See, also, *Burnell* v. *Maloney*, 36 Vt. 636; *Sutter* v. *Lackmann*, 39 Mo. 91; *Carruthers* v. *Bailey*, 3 Ga. 105. So, in New York, it is held, that where the purchaser at a sheriff's sale on execution dies, and the deed of conveyance is executed to his executor or administrator, such executor or administrator may bring an action to recover possession of the premises so conveyed without joining any of the heirs with him. *Reynolds* v. *Darling*, 42 Barb. 418. And by statute in that State, executors and administrators may maintain actions for trespass committed on the real estate of the deceased in his life-time. 2 R. S. 114, § 4; id. 447, § 1; 6 Wait's Pr. 323.

§ 7. **Injury to, or conversion of, personal property.** It is clear that an executor or administrator may maintain trover for property of the deceased converted in his life-time. *Towle* v. *Lovet*, 6 Mass. 394; *Manwell* v. *Briggs*, 17 Vt. 176; *Eubanks* v. *Dobbs*, 4 Ark. 173. See *ante*, § 4. The English statute of 4 Edw. III, ch. 7, gave to executors an action of trespass, for taking and carrying away the goods of their testator, in his life-time; and by the equity and liberal construction of that statute it has been extended to almost every injury done to the personal estate of the testator before his death. It applies to wasting and destroying as well as to taking and carrying away the goods of the testator (*Snider* v. *Croy*, 2 Johns. 227), and this accords with the provision of the New York statute on the subject. Id. And see 6 Wait's Pr. 323.

In California, under the general authority conferred by statute, executors have the right to institute an action of replevin for the recovery of wood removed wrongfully from lands of the testator, after it had been first cut therefrom. *Halleck* v. *Mixer*, 16 Cal. 574. And see *Haight* v. *Green*, 19 id. 113. Under the statute of Indiana, an administrator may file a bill in chancery against one who intermeddles with, or embezzles, goods of the estate, instead of proceeding at law. *Thorn* v. *Tyler*, 3 Blackf. (Ind.) 504.

An administrator may maintain trespass for an injury to personal property committed *after the death* of the intestate, and *before* administration granted. *Tharpe* v. *Stallwood*, 1 D. & L. 24; S. C., 5 M. & G. 760; 6 Scott, N. R. 715; *Hutchins* v. *Adams*, 3 Me. 174; *Knox* v. *Bigelow*, 15 Wis. 415.

An executor, authorized to lease premises, who has no estate in the premises, cannot maintain an action for waste. Such action must be by a reversioner in fee. *Page* v. *Davidson*, 22 Ill. 112.

§ 8 **Collecting assets and securities.** As to what are to be deemed assets in general, see *ante*, Vol. 1, 348. All the chattels of an intestate, wherever situated, are assets, if the administrator, by reasonable diligence, might have possessed himself of them. *Gray* v. *Swain*, 2 Hawks (N. C.), 15. And see *Luce* v. *Treasurer, etc.*, Wright (Ohio), 654; *Rockwell* v. *Saunders*, 19 Barb. 473; *Vincent* v. *Sharp*, 2 Stark. 507. It is the duty of an executor or administrator to receive the assets of the estate, and to collect the debts owing to the deceased as soon as he reasonably can; and if they are lost by his unreasonable delay, he will be responsible for the loss. *Feagan* v. *Kendall*, 43 Ala. 628. Upon the death of the testator, the legal title to the personal property vests in the executors. *Beecher* v. *Buckingham*, 18 Conn. 120; *Liptrot* v. *Holmes*, 1 Kelly (Ga.), 381. A debt, due from an executor to the estate of the testator, is assets in his hands, immediately, for the payment of debts. *Purdom* v. *Tipton*, 9 Ala. 914; *Hall* v. *Hall*, 2 McCord's Ch. (S. C.) 269; *Kaster* v. *Pierson*, 27 Iowa, 90; S C., 1 Am. Rep. 254; *Simmons* v. *Gutteridge*, 13 Ves. 264. And where an heir is indebted to the estate, and in the distribution thereof there is a surplus over his share, it is the duty of the administrator to collect it and account for it in the same way as for any other debt. *Springer's Appeal*, 29 Penn. St. 208. So, it has been held that where a covenant of seizin is broken in the life-time of the ancestor, the right of action goes to the personal representatives, and not to the heir. *Hamilton* v. *Wilson*, 4 Johns. 72. But it has been held, that the personal representative, and not the heir, is the proper party to bring action upon a covenant against incumbrance, broken during the life of the ancestor. *Frink* v. *Bellis*, 33 Ind. 135; S. C., 5 Am. Rep. 193. See *ante*, title *Covenants*.

But only those things in which a person has a beneficial interes- are assets, and not those which he holds in trust for another. *Thompson* v. *White*, 45 Me. 445; *Green* v. *Collins*, 6 Ired. (N. C.) L. 139. Thus, stock held by a trustee is not assets in the hands of his administrators or assignees. *United States* v. *Cutts*, 1 Sumn. (C. C.) 133. And money collected by an attorney, and kept distinct and unmixed with the rest of his property, by him, is not to be administered on his death as a part of his estate. *Schoolfield* v. *Rudd*, 9 B. Monr. (Ky.) 291. So, where certain funds are set apart for a specific purpose, the executors hold these funds as trustees, and the funds are trust assets and not general assets. *Fisher* v. *Fisher*, 1 Bradf. (N. Y.) 335. And see *Barker* v. *May*, 4 M. & R. 386; S. C., 9 B. & C. 489.

At common law, lands are not assets in the hands of an administrator, except as they are subjected to his authority by the order of a

competent court. *Sheldon* v. *Rice*, 30 Mich 296; *Vaughan* v. *Deloutch*, 65 N. C. 378. And a squatter's claim on the public lands, and improvements made by him thereon, are not assets in the hands of his executor or administrator. *Bowen* v. *Burnett*, 1 Pinn. (Wis. T.) 658. But a lease for years, of whatever duration, is a chattel interest, and, upon the owner's decease, passes to his executor or administrator. *Lewis* v. *Ringo*, 3 A. K. Marsh. (Ky.) 247; *Murdock* v. *Ratcliff*, 7 Ohio, Part 1st, 119. So, a miner's claim, being a mere possessory right on public lands, is personalty, and may be sold and conveyed by the administrator of the deceased owner's estate. *Corbett* v. *Berryhill*, 29 Iowa, 157. And a mortgage before foreclosure is considered in equity as a chattel interest going to the executor or administrator. *Taft* v. *Stevens*, 3 Gray, 504; *Burton* v. *Hintrager*, 18 Iowa, 348; *Chase* v. *Lockerman*, 11 Gill. & J. (Md.) 185.

Private letters pass to the personal representative, but they are not assets which may be sold in the course of administration to pay debts. The property which the receiver of a letter acquires in it is not such a property as the holder must have in order to make them assets. *Eyre* v. *Higbee*, 35 Barb. 502; S. C., 22 How. 198.

As against an administrator, debts due to the intestate are not to be considered as assets till actually received, although not stated in the inventory to be desperate. *Giles* v. *Dyson*, 1 Stark. 32. And it is not the duty of an executor or administrator to endeavor to collect doubtful claims at the expense of the estate, without being indemnified for the costs by the parties interested. *Sanborn* v. *Goodhue*, 28 N. H. 48; *Hepburn* v. *Hepburn*, 2 Bradf. (N. Y.) 74. And see *Successor of Pool*, 14 La. Ann. 677. Nor is an administrator chargeable with a bequest made to the intestate in his life-time, where the knowledge of it is not brought home to him. *Sarah* v. *Gardner*, 24 Ala. 719.

Goods taken away, which continue in specie in the hands of the wrong-doer, may be recovered by the executor or personal representative; and if they have been disposed of, an action for money had and received will lie to recover their value. *Potter* v. *Van Vranken*, 36 N. Y. (9 Tiff.) 619. So, if money due to a deceased person be paid to his children or heirs, who would be entitled to it on distribution of his effects, yet his personal representative may recover it from them. *Eisenbise* v. *Eisenbise*, 4 Watts, 134. A payment of assets to any but the personal representatives of the deceased is a mispayment. Id.

§ 9. **Custody of personal estate.** Executors or administrators have the legal right to take into their custody all the assets of their testator or intestate. *Cook* v. *Burton*, 5 Bush (Ky.), 64. They are the only representatives recognized by the law, in regard to the personal assets,

and their title is exclusive. *Beattie* v. *Abercrombie*, 18 Ala. 9. Their right to the possession of personal property is not impaired by an injunction which forbids its distribution. *McCutchen* v. *McCutchen*, 8 Port. (Ala.) 151. But so far as they are concerned, it is their duty, simply, to preserve the estate until distribution. *Brenham* v. *Story*, 39 Cal. 179. It is no part of their duty or authority to manage the estate for the benefit of the estate, or of those entitled to its distribution. Id.; *Steele* v. *Knox*, 10 Ala. 608. Nor will they be allowed to speculate on the estate. *Kellar* v. *Beelor*, 5 T. B. Monr. (Ky.) 573. They stand in the position of trustees for those interested in the estates upon which they administer, and are, therefore, liable only for want of due care and skill. *Merritt* v. *Merritt*, 62 Mo. 150; *State* v. *Meagher*, 44 id. 356; *Alston* v. *Cohen*, 1 Woods, 487; *Williams* v. *McClung*, 6 Heisk. (Tenn.) 443. They will be justified in pursuing a course which a judicious man would do under the same circumstances, looking alone to his worldly interests (*Kee* v. *Kee*, 2 Gratt. [Va.] 116; *Whitney* v. *Peddicord*, 63 Ill. 249; *Gould* v. *Hayes*, 19 Ala. 438; *Smith* v. *Byers*, 41 Ga. 439); and they are not to be regarded as insurers against losses from casualties and misfortunes which ordinary sagacity and diligence could not prevent. *Rubottom* v. *Morrow*, 24 Ind. 202; *Mikell* v. *Mikell*, 5 Rich. (S. C.) Eq. 220; *Noble* v. *Jones*, 35 Tex. 692. They should preserve the property of the deceased distinct from their own, that it may be known and readily traced; and if they do so, the courts will protect and assist them to the extent of their power. *Hagthorp* v. *Hook*, 1 Gill & J. (Md.) 270. But however clear it may be that an executor or administrator mixed the funds of the estate with his own, without any dishonest intention of gain to himself, such a practice ought never to come before a court without being in some way marked with disapprobation. *Parker's Estate*, 64 Penn. St. 307.

It was formerly held, with great strictness, that no one could interfere in the least with the estate of a deceased person. And to such an extent was this doctrine carried, that a wife has been held liable as executrix *de son tort* for milking the cow of her deceased husband. *Gerret* v. *Carpenter*, 2 Dyer, 166, note. But it is now determined that there are many acts which do not make one liable, such as looking up the goods of the deceased for preservation, directing the funeral and paying the expenses thereof, feeding his cattle, etc., for these are necessary acts of kindness and of charity. *Camden* v. *Fletcher*, 4 M. & W. 378; *Givens* v. *Higgins*, 4 McCord (S. C.), 286; *Brown* v. *Sullivan*, 22 Ind. 359. So, it has been held that one, who is the widow's agent, in good faith sells perishable property of the estate of the dead husband and accounts for the proceeds, is not liable to an adminis-

trator afterward appointed. *Perkins* v. *Ladd*, 114 Mass. 420; S. C., 19 Am. Rep. 374.

Corn, or any other product of the soil raised annually by labor and cultivation, is personal estate, and goes to the executor and not to the heir. *Penhallow* v. *Dwight*, 7 Mass. 34; *Gwin* v. *Hicks*, 1 Bay. (S. C.) 503; *Thornton* v. *Burch*, 20 Ga. 791; *Singleton* v. *Singleton*, 5 Dana (Ky.), 92; *Whaley* v. *Whaley*, 51 Mo. 36. But growing grass and fruits are not emblements, and are not, as such, part of the personal property of a deceased person; they pass to his heirs or devisees, and not to his administrator or executor. *Kain* v. *Fisher*, 6 N. Y. (2 Seld.) 597; S. C., Seld. Notes, 9; *Evans* v. *Inglehart*, 6 Gill. & J. (Md.) 188.

In Mississippi, a crop growing at the time of the decedent's death is assets, and, if deemed proper, the administrator may sell the same under an order from the probate court, or, if thought best, the court may direct that he cultivate and complete the crop, in which event all the other property belonging to the estate may be employed for that purpose. *Farley* v. *Hord*, 45 Miss. 96.

§ 10. **Sale of personal estate.** Executors and administrators can sell or distribute the personal estate, and pass a good title (*Overfield* v. *Bullitt*, 1 Mo. 749; *Evans* v. *Chew*, 71 Penn. St. 47; *Hamrick* v. *Craven*, 39 Ind. 241; *Baines* v. *McGee*, 9 Miss. 208); and they are bound so to dispose of the personal estate in a reasonable time. If they fail in their duty in this respect, they will be held responsible for any loss which may happen to the estate by reason of the delay. *Griswold* v. *Chandler*, 5 N. H. 492; *Matter of Gorman*, 50 Mo. 179; *Goodbear* v. *Gary*, 1 La. Ann. 240. So, if they sell the property at an inadequate price, they may be charged with its actual value at the time of the sale. *Matter of Saltus*, 3 Keyes (N. Y.), 500; S. C., 3 Abb. Ct. App. 243. They ought to make safe sales, or take adequate security for the price of things sold. *Walls* v. *Grigsby*, 42 Ala. 473.

But although the personal representative of the deceased is invested with the absolute power to dispose of the decedent's personal estate, yet he can make no valid sale or pledge of the assets, as security for, or in payment of, his own debt. *Williamson* v. *Branch Bank at Mobile*, 7 Ala. 906. And the transfer of a note due to an estate, by the personal representative, in payment of his own debt, gives to the assignee with notice no rights of recovery. *Smartt* v. *Watterhouse*, 6 Humph. (Tenn.) 158; *Latham* v. *Moore*, 6 Jones' (N. C.) Eq. 167; *Scott* v. *Searles*, 15 Miss. 498. And see *Thomasson* v. *Brown*, 43 Ind. 203. But see *Spellman* v. *Culbertson*, 15 Ind. 441; *Wilson* v. *Doster*, 7 Ired. (N. C.) Eq. 231; *Hough* v. *Bailey*, 32 Conn. 288.

§ 11. **Loaning or depositing money.** It is the general rule, that if an executor or administrator lends the money or choses in action of the estate, without authority to do so, it is a conversion, for which he becomes personally liable. *Tomkies* v. *Reynolds*, 17 Ala. 109; *Walls* v. *Grigsby*, 42 id. 473; *State* v. *Johnson*, 7 Blackf. (Ind) 529; *Moore* v. *Felkle*, 7 Fla. 44; *Cason* v. *Cason*, 31 Miss. 578. See *James* v. *Johnson*, 44 Ala. 629. Loaning money upon mere personal security is a *prima facie* breach of trust. *Ackerman* v. *Emott*, 4 Barb. 626; S. C., 3 N. Y. Leg. Obs. 337; *Nance* v. *Nance*, 1 So. Car. 209; *Moore* v. *Hamilton*, 4 Fla. 112; *Swoyer's Appeal*, 5 Penn. St. 377. And where a testator authorizes his three executors to lend money on personal security, it is a breach of trust if two of the executors lend it to the third. —— v. *Walker*, 5 Russ. 7. So, where executors lend money of the estate on bond and mortgage, they must be assured that the title of the security is good, and must advance no more upon land than men of prudence would do out of their own money. And where executors had loaned money on a second mortgage beyond the value of two-thirds of the mortgaged estate, they were held personally liable for the deficiency. *Bogart* v. *Van Velsor*, 4 Edw. Ch. 718. See *Miller* v. *Proctor*, 20 Ohio St. 442.

An administrator who deposits trust funds on his own private account at a bank, which fails, will be held liable for the amount to the estate. *Commonwealth* v. *McAlister*, 28 Penn. St. 480. See, also, *Succession of Legarde*, 20 La. Ann. 148. But see *Swinfen* v. *Swinfen*, 29 Beav. 211; *Matter of Stafford*, 11 Barb. 353. But executors depositing moneys belonging to the estate, with the same persons as the testator intrusted with his moneys in his life-time, although they are not bankers, are not liable for a loss sustained by their bankruptcy. *Dorchester* v. *Effingham*, Tamlyn, 279. And see *Estate of Seidter*, 5 Phila. (Penn.) 85. So, where an executor deposited funds in the State treasury, without an order of court, but it appeared that the funds would have perished if retained in his hands, the court refused to charge him with a loss by depreciation of the State securities. *Morton* v. *Smith*, 1 Desau. (S. C.) 123.

A special administrator, being himself a mere depositary charged with keeping safely the moneys belonging to the trust, may, and it is his duty to deposit such money with some solvent bank or other institution that receives money on deposit, in order that it may be kept safely, and paid over promptly to the person entitled by law to receive it. This duty forbids investment, and of course involves the loss of interest, unless the depositary will pay interest, and yet refund the moneys on demand, as trust companies and savings banks sometimes do. *Has-*

kin v. *Haskin*, 4 Lans (N. Y.) 90. If the deposit is thus made, and the bank fails, the special administrator would not probably be liable for the loss. Id.

§ 12. **Carrying out contracts.** Administrators ought not to refuse to carry out a contract entered into by the intestate, because the effect of the breach would be to increase the personal estate. And where an intestate entered into a contract for a house to be built upon his land, and died before the completion of the house; and the administrators (one of whom was the heir at law) allowed the house to be completed, and paid the amount specified in the contract out of the personal estate, — it was held, that they were warranted in so doing. *Cooper* v. *Jarman*, 12 Jur. (N. S.) 956; S. C., 15 W. R. 142. See *Duff* v. *Gardner*, 7 Lans. (N. Y.) 165. Where an executor bought materials to enable him to complete unfinished contracts of his testator, and after using the materials for that purpose, received the money therefor, and put it into his own private business, the estate was held not liable to pay the party who furnished the materials. *Oram's Estate*, 9 Phil. (Penn.) 358.

§ 13. **Collecting rents.** Rents of real estate accruing before the death of the decedent are assets belonging to the administrator, which he may collect by suit. *Crawford* v. *Ginn*, 35 Iowa, 543; *Mills* v. *Merryman*, 49 Me. 65. But rents and profits of real estate accruing after the death of the intestate are not assets. Id.; *Shawhan* v. *Long*, 26 Iowa, 488. See *Menifee* v. *Menifee*, 8 Ark. 10. And a mere naked authority to sell real estate given to an executor does not render him responsible for the rents thereof. *Rubottom* v. *Morrow*, 24 Ind. 202. It is no part of his duty to collect rents (*Myer's Estate* 9 Phil. [Penn.] 310); but where executors, having a mere power in trust to sell lands, collected the rents thereof under the impression that they were entitled to receive them as executors, they were held accountable for them to the heirs. *Campbell* v. *Johnston*, 1 Sandf. Ch. 148. And see *Goodrich* v. *Thompson*, 4 Day (Conn.), 215; *McCoy* v. *Scott*, 2 Rawle (Penn.), 222. So, although an administrator is not required to exercise a control over the real estate of his intestate, yet, if he assumes to lease it, he will hold the rent for the use of those legally entitled thereto. *Terry* v. *Ferguson*, 8 Port. (Ala.) 500. See *Moncrief* v. *Ross*, 50 N. Y. (5 Sick.) 431.

§ 14. **Joinder of plaintiffs.** It is a rule of the common law, that when there are several executors or administrators they must all join in the action, even though some of them renounce, or omit to prove the will. *Hensloe's case*, 9 Co. 36; *Watkins* v. *Brent*, 1 My. & Cr. 97; *Hill* v. *Smalley*, 25 N. J. Law, 374. In the case of executors,

the reason assigned for the rule is, that he derives title, not from the probate but from the will, and a probate granted to one executor inures to the benefit of all. *Webster* v. *Spencer*, 3 Barn. & Ald. 360. The proper practice, where one renounces, seems to be, to prosecute in the name of all the executors named in the will, if living; and on summons to those who will not join, there will be judgment of severance, and the others may then proceed and recover in their own names. *Bodle* v. *Hulse*, 5 Wend. 313.

One of the representatives of an intestate may support a bill against the administrator for his share of the intestate's estate, without joining the other representatives. *Conway* v. *Green*, 1 Harr. & J. (Md.) 151.

§ 15. **Joinder of causes of action.** It is now well settled at the common law, that an executor or administrator may join in the same declaration, counts on promises to himself, with counts on promises to the testator or intestate; the rule being, that counts may be joined whenver the money, if recovered, would be assets. *Ord* v. *Fenwick*, 3 East, 104; *Cowel* v. *Watts*, 6 id. 405; *Fry* v. *Evans*, 8 Wend. 530; *Sullivan* v. *Holker*, 15 Mass. 374. And see *Patterson* v. *Patterson*, 59 N. Y. (14 Sick.) 574, 576; 17 Am. Rep. 384. So, a count on a promise made by an executor or administrator, as such, and in which he is not charged as personally liable, may be joined with a count on a promise made by the intestate or testator. *Carter* v. *Phelps*, 8 Johns. 440; *Reeve* v. *Cawley*, 17 N. J. Law, 415; *Howard* v. *Powers*, 6 Ohio, 92. See *Tradesmen's Nat. Bank* v. *McFeely*, 61 Barb. 522.

But counts by or against an executor or administrator cannot be joined with counts by or against him in his own right. *Mason* v. *Norcross*, 1 N. J. Law, 242; *Bogle* v. *Kreitzer*, 46 Penn. St. 465; *Epes* v. *Dudley*, 5 Rand. (Va.) 437; *Godbold* v. *Roberts*, 20 Ala. 354; *McDaniel* v. *Parks*, 19 Ark. 671. And a count on a cause of action arising after the death of a testator cannot be joined with a count on a cause arising in his life-time. *Myer* v. *Cole*, 12 Johns. 349; *Demott* v. *Field*, 7 Cow. 58.

Where, in an action against an executor, the declaration shows a contract made by the testator only, and not by the executors, a promise by the testator may be joined with a promise by the executors as such, in the same, or different counts. But, if the declaration sets up a contract made by the testator, it cannot be joined with a contract made by the executor. *Taylor* v. *DeGroot*, 12 Barb. 328; *Strohecker* v. *Grant*, 16 Serg. & R. (Penn.) 237.

In an action of trover by an administrator, the first count may allege

a conversion in the life-time of the intestate, and the second count a conversion after his decease. *French* v. *Merrill*, 6 N. H. 465.

§ 16. **Compensation of executor, etc.** In England, an executor or administrator can recover no compensation for his personal services, in the discharge of his duties, even if he has benefited the estate to the neglect of his own affairs. *Brocksopp* v. *Barnes*, 5 Mad. 90; *Barrett* v. *Hartley*, L. R., 2 Eq. 789. The rule is that no compensation can be charged against the trust estate beyond the amount of actual disbursements. *Collins* v. *Carey*, 2 Beav. 128. An executor will not even be allowed to charge for the employment of an agent, except under very peculiar circumstances (*Weiss* v. *Dill*, 3 M. & K. 26); and an agent who is named as executor is not entitled to charge commissions on business done subsequently to the testator's death. *Sheriff* v. *Axe*, 4 Russ. 33. And even an attorney or solicitor, who is an executor and renders professional services to the estate, cannot recover compensation. *Moore* v. *Frowd*, 3 My. & Cr. 45; *Burge* v. *Brutton*, 2 Hare, 373. And see *Harbin* v. *Darby*, 28 Beav. 325; *In re Taylor*, 18 id. 165; *Broughton* v. *Broughton*, 5 De G., M. & G. 160; *Lyon* v. *Baker*, 5 De G. & Sm. 622; *Green* v. *Winter*, 1 Johns. Ch. 26. Executors will, however, be allowed all proper expenses out of pocket, whether they be provided for in the instrument creating the trusts or not (*Atty.-Gen.* v. *Mayor of Norwich*, 2 My. & Cr. 424); such as traveling expenses (*Ex parte Lovegrove*, 3 D. & C. 763); fees for counsel and costs of a lawsuit (*Fearns* v. *Young*, 10 Ves. 184); unless such expenses were improper (*Malcolm* v. *O'Callaghan*, 3 M. & C. 52); or the litigation was occasioned by their own negligence. *Caffrey* v. *Darby*, 6 Ves. 488, 497.

In this country, executors and administrators have never been required to perform their duties gratuitously, and compensation should be refused only in cases of willful default, or gross negligence, causing loss to the estate. See *Smith* v. *Kennard*, 38 Ala. 695; *Barney* v. *Saunders*, 16 How. (U. S.) 542; *Adams* v. *Westbrook*, 41 Miss. 385; *Frey* v. *Frey*, 17 N. J. Eq. 71; *Morris* v. *Morris*, 4 Gratt. (Va.) 293; *Estate of Isaacs*, 30 Cal. 105; *Sullivan* v. *Herrera*, 7 Hun (N. Y.), 309; *Estate of Nicholson*, 1 Nev. 518. Even unfaithful administration will not deprive an executor of a right to compensation for his services, so far as they have been beneficial to the estate. *Jennison* v. *Hapgood*, 10 Pick. 77; *Tiner* v. *Christian*, 27 Ark. 306. See *Finch* v. *Ragland*, 2 Dev. (N. C.) Eq. 137; *Gould* v. *Hayes*, 19 Ala. 438. But compensation for services as executor, and as trustee, in regard to the same money, will not be allowed to the same person. *Valentine* v. *Valentine*, 2 Barb. Ch. 430; *Holley* v. *S. G.*, 4 Edw. Ch. 284. An executor, who is also

tenant for life of the estate of the testator, is, however, entitled to commissions. *Blount* v. *Hawkins*, 4 Jones' (N. C.) Eq. 161. And the same person has been allowed to charge commissions as executor and guardian, in respect to the same money. *Ex parte Witherspoon*, 3 Rich. (S. C.) Eq. 13.

The legislatures of the different States have introduced provisions by statute, for competent remuneration to those to whom the law commits the care and charge of the estate of deceased persons, besides reimbursing their expenses; and on this subject the statute of the particular State should be consulted. See *Boyd* v. *Hawkins*, 2 Dev. (N. C.) Eq. 334; 2 Lead. Cas. Eq. (4th Am. ed.) 539, *et seq.*

§ 17. **Judgment in actions by.** If an executor or administrator brings suit in his *representative capacity*, he cannot recover by virtue of any individual interest he may have in the matter in controversy. *Burdyne* v. *Mackey*, 7 Mo. 374. But a judgment recovered by "A. B., administrator," is presumed to be recovered in his own right and not by him as administrator, it not appearing that he could not have recovered in his own right. *Hall* v. *Pearman*, 20 Tex. 168.

An executor may recover in his own name without counting as executor; still, the defendant has a right to know and to prove whether the recovery is as executor or not, with reference to his protection in the future. *Bond* v. *Corbett*, 2 Minn. 248.

ARTICLE II.

ACTIONS AGAINST EXECUTORS AND ADMINISTRATORS.

Section 1. In general. Causes of action against an executor or administrator may arise out of the acts or default of the testator or of the intestate, or, they may have their origin in some claim to a part in the distribution of the estate. But, it is the general rule, that no action can be maintained against any executor or administrator, in his official capacity, in the courts of any other State or country than that from which he derives his authority to act in virtue of the probate, and letters testamentary or the letters of administration there granted to him. *Vermilya* v. *Beatty*, 6 Barb. 429; *Smith* v. *Webb*, 1 id. 231; *Leonard* v. *Putnam*, 51 N. H. 247; S. C., 12 Am. Rep. 106; *Jackson* v. *Johnson*, 34 Ga. 511; Story on Confl. of Laws, § 513. And see *ante*, art. 1, § 2.

§ 2. **Who made defendants.** Where there are several executors or administrators, they are esteemed but one person in representing the estate of the testator or intestate (*Wheeler* v. *Wheeler*, 9 Cow. 34); and

it is not allowable to sue any number less than all, unless, perhaps, for special reasons shown, the character of the relief sought makes it unnecessary to join them. *Clements* v. *Kellogg*, 1 Ala. 330; *Brotten* v. *Bateman*, 2 Dev. (N. C.) Eq. 115. In actions against *femes covert* as executors their husbands must be joined. *Mounson* v. *Bourn*, Cro. Car. 519; *Kings* v. *Hilton*, id. 603; 2 Wms. on Exrs. 1751. And if one of several executors, sued jointly, be an infant, he must defend by guardian. *Frescobaldi* v. *Kinaston*, Stra. 783. If one of two or more joint executors die, the action must be brought against the survivors only, and it will not lie against the personal representative of the deceased executor and the surviving executors jointly. 2 Wms. on Exrs. 1751; Com. Dig., Adm. (B.) 12. And, although, in general, all the executors must be sued jointly, yet the plaintiff is bound to join those only who have administered. *Munt* v. *Stokes*, 4 Term R. 561; *Alexander* v. *Mawman*, Willes, 40, 42; *Douglas* v. *Forrest*, 4 Bing. 686; 1 Moo. & P. 663. And see *Moore* v. *Willett*, 2 Hilt. (N. Y.) 522.

§ 3. **Funeral expenses.** An action may be maintained against an executor or administrator for the funeral expenses of the deceased; for the law raises a promise on the part of the personal representative to pay such expenses, so far as he has assets. *Hapgood* v. *Houghton*, 10 Pick. 154; *Campfield* v. *Ely*, 1 Green (N. J.), 150; *Rappelyea* v. *Russell*, 1 Daly, 214; *Patterson* v. *Patterson*, 59 N. Y. (14 Sick.) 574; 17 Am. Rep. 384. See *Thompson* v. *Smith*, 57 N. H. 306. And as part of the expenses of the funeral, the personal representative has been permitted to reckon in his account a moderate expense for the widow and family of the deceased. *Wood's Estate*, 1 Ashm. (Penn.) 314. But see *Johnson* v. *Baker*, 2 Carr. & P. 207. So, it has been held that tombstones are properly a part of the funeral expenses, even where the estate is insolvent. *Fairman's Appeal*, 30 Conn. 205. See *Wood* v. *Vandenburgh*, 6 Paige, 277; *Ferrin* v. *Myrick*, 53 Barb. 76; 41 N. Y. (2 Hand) 315. But, generally, funeral expenses are to be regulated by the circumstances of the deceased, and the usages of the country; and if proper to the estate and degree of the deceased, they must be preferred to all other debts, and are first to be paid. *Palmer* v. *Stephens*, R. M. Charlt. (Ga.) 56; *Parker* v. *Lewis*, 2 Dev. (N. C.) 21; *Rodgers* v. *Price*, 3 Y. & J. 28; *Hancock* v. *Padmore*, 1 B. & Ad. 260; *Reeves* v. *Ward*, 2 Bing. N. C. 235; S. C., 2 Scott, 390; *Brice* v. *Wilson*, 3 N. & M. 512. And if executors neglect to give orders for the funeral of the testator, and have sufficient assets for that purpose, they are liable upon an implied promise to the person who furnishes the funeral in a manner suitable

to the testator's degree and circumstances. *Tugwell* v. *Heyman*, 3 Camp. 298; *Rappelyea* v. *Russell*, 1 Daly, 214. Where the heirs at law had voluntarily paid the funeral expenses of the intestate, the court would not permit the amount to be refunded out of the personalty. *Coleby* v. *Coleby*, 12 Jur. (N. S.) 496. And it has been held, that where one voluntarily assumes the funeral expenses of the deceased, and then brings an action against the personal representative, without notice of the expenditures, he cannot recover. *Gregory* v. *Hooker*, 1 Hawks (N. C.), 394. Nor can he volunteer to incur such expenses, and recover the amount, especially if the articles used were unnecessary, and the executor paid all the ordinary funeral expenses. *Hewett* v. *Bronson*, 5 Daly, 1. See *ante*, title *Cemeteries*, Vol. 2, p. 127.

§ 4. **Upon contracts of deceased.** See *ante*, art. 1, § 1. As a general rule, a cause of action founded on contract, either express or implied, will survive *against* an executor or administrator as well as in his favor. See 1 Wms. Saund. 216 a, note 1. The exceptions to this rule are contracts of a strictly personal nature, which do not survive against the personal representative, except for a perfected breach in the decedent's life-time. *McGill* v. *McGill*, 2 Metc. (Ky.) 258; *Dickinson* v. *Calahan*, 19 Penn. St. 227. As included in the exceptions to the general rule, may be mentioned contracts for the instruction of apprentices (*Baxter* v. *Burfield*, 2 Stra. 1266; *Commonwealth* v. *King*, 4 Serg. & R. 109); contracts by writers or authors to compose or prepare works of any kind for the press (*Marshall* v. *Broadhurst*, 1 Tyrwh. 348); and contracts to marry. Vol. 1, 727; *ante*, art. 1, § 1. But see *Shuler* v. *Millsap*, 71 N. C. 297. So, a covenant not to exercise a particular trade was held to establish a mere personal relation, not binding upon executors. *Cooke* v. *Colcraft*, 2 Wm. Bl. 856. See, also, *Wentworth* v. *Cock*, 2 P. & D. 251; S. C., 10 Ad. & El. 45; *Bally* v. *Wells*, 3 Wils. 29.

It is held, that an administrator cannot be held liable in *assumpsit* against him as administrator, and as upon a promise by his intestate for medical services rendered the family of the deceased after his death. *Bomford* v. *Grimes*, 17 Ark. 567. Nor can an action be maintained against the personal representative of the sheriff for an escape of one in execution, this being an injury in the nature of a tort. *Martin* v. *Bradley*, 1 Caines, 124; *Hambly* v. *Trott*, Cowp. 375. See *Heinmuller* v. *Gray*, 44 How. (N. Y.) 260; S. C., 13 Abb. (N. S.) 299; 3 Jones & Sp. 196. So, a penal action cannot be supported against an executor for a penalty forfeited by the testator under a penal statute. Com. Dig., Adm., B. 15. And see *Bank of California* v. *Collins*, 5 Hun (N. Y.), 209.

In a recent case in New York, it is held to be a well-settled rule, that the contracts of executors, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, as for services rendered, goods or property sold and delivered, or other consideration moving between the promisee and the executors as promisors, are the personal contracts of the executors, and do not bind the estate, notwithstanding the services rendered, or goods or property furnished, or other consideration moving from the promisee, are such that the executors could properly have paid for the same from the assets, and been allowed for the expenditure in the settlement of their accounts. The principle is, that an executor may disburse and use the funds of the estate for purposes authorized by law, but may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator. *Austin* v. *Munro*, 47 N. Y. (2 Sick.) 360, 366; affirming S. C., 4 Lans. 67. And see *Stanton* v. *King*, 8 Hun (N. Y.), 5.

§ 5. **For torts of deceased.** At common law, actions for wrongs for personal injuries do not survive; for executors and administrators do not represent the wrongs of the deceased, except so far as their personal property is affected. *People* v. *Gibbs*, 9 Wend. 29; *Franklin* v. *Low*, 1 Johns. 396; *Cravath* v. *Plympton*, 13 Mass. 454; *M'Evers* v. *Pitkin*, 1 Root (Conn.), 216. The rule has been stated at length as follows: "If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, then the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired, which benefits the testator, then an action for the value of the property shall survive against the executor; as for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or the sale of the trees, he shall" Lord Mansfield in *Hambly* v. *Trott*, Cowp. 371.

So, in general, no action in form *ex delicto*, as trover (*Jarvis* v. *Rogers*, 15 Mass. 398; *Hench* v. *Metzer*, 6 Serg. & R. 272), case (1 Chit. Pl. 101); or trespass (*Harris* v. *Crenshaw*, 3 Rand. [Va.] 14), could, at common law, be maintained against an executor, for an injury to personal property, committed by his testator. *Hambly* v. *Trott*, Cowp. 371; 1 Wms. Saund. 216 a, note 1. As to *replevin*, see *Merritt* v. *Lumbert*, 8 Me. 128; and as to *debt*, see *Turner* v. *Booker*, 2 Dana (Ky.), 334; *Tompkies* v. *Walkers*, 6 Call. (Va.) 44. Likewise, at common law, an action for libel did not survive against the representatives of a deceased defendant (*More* v. *Bennett*, 65 Barb. 338); and so,

of an action for slander. *Long* v. *Hitchcock*, 3 Ham. (Ohio) 274. The general rule of the common law has, however, been modified or abrogated by express statutory provision in many of the States, and almost all actions of tort, and especially those for injuries to person or property, are made to survive against the personal representative of the wrong-doer. See, as to the statute of New York, *Haight* v. *Hayt*, 19 N. Y. (5 Smith) 464; and see Gen. Stat. Vermont, ch. 52, §§ 10–13; Gen. Stat. Mass., ch. 127, § 1.

If an executor commits a trespass, it is his individual and personal act, and not his representative act as the executor of his testator. It has, therefore, been held, that case will not lie against executors *as such*, for damages caused by their raising the dam on a stream, whereby the plaintiff's mill was flowed, when the dam and the lands on which it is situated had, under the will of their testator, become vested in the executors and others. *Plimpton* v. *Richards*, 59 Me. 115.

§ 6. **Upon debts of deceased.** The personal representative of the deceased is bound to administer the estate according to law, by paying the debts before making distribution to legatees or heirs. This duty is enjoined upon him by law, by his oath of office, and by a sound public policy. *McIntosh* v. *Hambleton*, 35 Ga. 95; *Thomas* v. *Riegel*, 5 Rawle, 266. When the creditor's demand has been presented within the proper period, it is entitled to payment as soon as the assets of the estate are converted into money. *Dean* v. *Portis*, 11 Ala. 104. But the personal representative is not bound to pay the debts of his decedent, beyond the assets which he receives (*Byrd* v. *Holloway*, 14 Miss. 199); nor will his written promise to do so, make him liable, unless founded on other sufficient consideration. Id. In an action against the personal representative, if there be a deficiency of assets, he must, however, plead it; for, as a general rule, a judgment against him is presumptive of assets to satisfy it. 1 Wms. Saund. 219 b, note. See id. 336; *Cousins* v. *Paddon*, 2 Cr., M. & R. 547, 558. See *post*, art. 3, § 6.

An executor is not liable for a debt contracted by his testator before he became of age, where it does not appear to have been contracted for necessaries, or to have been confirmed by the testator after he became of age, even though in his will he directed all his just debts to be paid. *Smith* v. *Mayo*, 9 Mass. 62. But it is otherwise as it regards a debt contracted for necessaries; and the executor of a lunatic was held liable for necessaries furnished to his testator, while *non compos mentis*, before a commission issued, and after the issuing of the commission and before the appointment of a committee. *La Rue* v.

Gilkyson, 4 Penn. St. 375. See, also, *Baxter* v. *Earl of Portsmouth*, 2 Carr. & P. 178; S. C., 5 B. & C. 170.

The right which a creditor has to his just proportion of the property which the deceased debtor dies possessed of, vests at the instant of his death; and the law commits it to the care of the personal representative upon an express trust, to pay each creditor his due. *McClintock's Appeal*, 29 Penn. St. 360.

§ 7. **Debts accrued since death.** It was formerly held that where the personal representative was sued upon a promise made after the decease of the testator or intestate, the defendant, if liable, would be held in his personal capacity, and the judgment be *de bonis propriis*. *Trewinian* v. *Howell*, Cro. Eliz. 91; *Hawkes* v. *Saunders*, 1 Cowp. 289.

But the rule as established by the later cases clearly is, that where the suit is based upon a promise, merely as executor or administrator, if within his authority as such, the judgment will be only *de bonis testatoris*. See *Powell* v. *Graham*, 7 Taunt. 580; *Dowse* v. *Coxe*, 3 Bing. 20; *Ashby* v. *Ashby*, 7 B. & C. 444.

It has, however, been held that an executor cannot be charged *as such*, either for money had and received by him, money lent to him, or on an account stated of money due from him as such, as those charges make him personally liable. *Rose* v. *Bowler*, 1 H. Bl. 109. So, it is held that an action cannot be maintained against an executor or administrator, *as such*, for goods furnished, or services rendered to the estate, after the death of the testator or intestate. *Fitzhugh* v. *Fitzhugh*, 11 Gratt. (Va.) 300; *Corner* v. *Shew*, 3 M. & W. 350. And see *Wigley* v. *Ashton*, 3 B. & A. 101; *Adams* v. *Adams*, 16 Vt 228; *Greening* v. *Sheffield*, Minor (Ala.), 276; *ante*, § 4. And it seems that a naked promise by the personal representative to pay the debt of the deceased, if there be no assets, is a mere *nudum pactum*. *Pearson* v. *Henry*, 5 Term R. 6; *Rann* v. *Hughes*, 7 id. 350, *n. a.*

§ 8. **For calls or subscriptions.** The executor of a deceased shareholder in a banking company is not liable to make good, out of his testator's assets, debts contracted by the company subsequently to the testator's death, although the shares were registered in the executor's name, and he received the dividends in his character of executor; the debts due at the time of the death of the testator having been subsequently discharged by the company. *Labouchere* v. *Tupper*, 11 Moore's P C. C. 198.

Where a testator held shares in a company, the calls on which shares formed specialty debts, it was held that, as against simple contract creditors, no part of the estate could be reserved to provide for future

calls. *Wentworth* v. *Chevell*, 3 Jur. (N. S.) 805; S. C., 26 L. J. Ch. 760.

§ 9. **For losses, etc.** Reasonable care and proper diligence are expected from executors and administrators, and watchfulness ought always to be brought to the fulfillment of the trust. When these qualities have been exercised, they will not be held responsible for losses which prudent management could not foresee nor avoid; nor will they be charged with gains which the like conduct on their part have not realized. *Voorhees* v. *Stoothoff*, 11 N. J. Law, 145; *Deberry* v. *Ivey*, 2 Jones' (N. C.) Eq. 370; *Webb* v. *Bellinger*, 2 Desaus. (S. C.) 482; *Whitney* v. *Peddicord*, 63 Ill. 249. And see *ante*, art. 1, § 9. Nor are they liable for the mismanagement or insolvency of their agents, which they could not foresee or control. *Calhoun's Estate*, 6 Watts (Penn.), 185; *Christy* v. *McBride*, 2 Ill. 75.

But, in general, property or money collected by an executor or administrator in his representative capacity, is held as assets, and he is liable to any party having a good title to such assets. *De Valengin* v. *Duffy*, 14 Pet. (U. S.) 282; *Montgomery* v. *Armstrong*, 5 J. J. Marsh. (Ky.) 175; *Duffy* v. *Neale*, Taney, 271.

§ 10. **For negligence.** Where the loss of goods belonging to the estate is occasioned by the negligence of the personal representative, he is chargeable with their value at the time of their loss, with interest (*Harris* v. *Parker*, 41 Ala. 604), although the goods never came into his possession. *Tuttle* v. *Robinson*, 33 N. H. 104. See *Irwin's Appeal*, 35 Penn. St. 294. So, if he improperly neglects to sell the personalty belonging to the estate, and uses it in the meantime, he will be charged with such property, at its appraised value. *Benson* v. *Bruce*, 4 Desaus. (S. C.) 463.

An executor or administrator, who has been guilty of gross negligence in omitting to collect a debt due the estate, will be personally charged with the debt and interest. *Shaffer's Appeal*, 46 Penn. St. 131; *Smith* v. *Hurd*, 16 Miss. 682; *Southall* v. *Taylor*, 14 Gratt. (Va.) 269; *Feagan* v. *Kendall*, 43 Ala. 628. So, an administrator who permits an attorney to retain in his hands, for several years, money of the estate collected by him, without any effort to collect it from the attorney, is chargeable with such money, on motion of the parties interested. *Abercrombie* v. *Skinner*, 42 Ala. 633. And if he holds notes belonging to the estate, the makers of which become suddenly insolvent, he must put the notes in suit at once, or he will become personally liable to the distributees. *Roberts* v. *Summers*, 47 Ga. 435. See *O'Dell* v. *Young*, 1 McMull. (S. C.) Ch. 155; *Glover* v. *Glover*, id. 153. An administrator is not, however, chargeable for not immediately bringing

suit on a note held by the decedent, where the drawer continued in good credit, and no bad faith or gross negligence was shown on the part of the administrator. *Keller's Appeal*, 8 Penn. St. 288. And see *Williams* v. *Skinker*, 25 Gratt. (Va.) 507. So, it is held, that an administrator is not liable for a debt due to his intestate's estate, because he neglects to sue the debtor, who appears to be unable to pay the debt. *Nelson* v. *Page*, 7 id. 160; *Mitchell* v. *Trotter*, id. 136. And, in general, the burden of proof is on the party seeking to charge the personal representative with a want of diligence in collecting debts due the estate. *Sheppard* v. *Gill*, 49 Ala. 162; *Deas* v. *Spann*, 1 Harp. (S. C.) Ch. 176.

Where, through mistake of law, an administrator neglected to bring a suit until he was barred by the statute of limitations, no fraud or willful default being imputable to him, the court refused to make him responsible for the loss of the property belonging to his intestate's estate. *Thomas* v. *White*, 3 Litt. (Ky.) 177.

§ 11. **For devastavit.** The word *devastavit* is commonly employed in the general sense of wasting the goods of the deceased; or in equity, in the sense of a breach of trust or misappropriation of the assets. Bro. Law Dict.; *Tuliaferro* v. *Bassett*, 3 Ala. 670. And when an ex ecutor or administrator has been guilty of a *devastavit*, he is required to make up the loss out of his own estate, as far as he had, or might have had, assets of the deceased. Thus, if an executor or administrator lets judgment go against him by default, it amounts to a confession of assets; and if he does not pay the execution, or produce assets, he is guilty of a *devastavit*, whereby he subjects himself to an action of debt upon the judgment, to be satisfied out of his own goods and chattels. *Walker* v. *Kendall*, Hard. (Ky.) 412. And see *Cope* v. *McFarland*, 2 Head (Tenn.), 543. There are many cases of *devastavit* other than by a direct abuse of the effects of the deceased, and several instances have been given in preceding sections. Thus, an administrator who fails to collect the debts of the estate he represents, as they become due; or collects the same in illegal or worthless funds, is guilty of a *devastavit*. *Oglesby* v. *Howard*, 43 Ala. 144; *Seigleman* v. *Marshall*, 17 Md. 550, *Mitchell* v. *Lutn*, 4 Mass. 654; *Moore's Estate*, 1 Tuck. (N. Y.) 41. And see *State* v. *Sloan*, 64 N. C. 702. So, it is a *devastavit* not to plead the general statute of limitations (*Thompson* v. *Brown*, 16 Mass. 172. And see *Woods* v. *Elliott*, 49 Miss. 168); or to pay debts of an inferior degree, where the assets retained are insufficient to pay those of a higher degree (*Braxton* v. *Winslow*, 4 Call. [Va.] 308; *Hinton* v. *Kennedy*, 3 So. Car. 459. See *Stephens* v. *Barnett*, 7 Dana [Ky.], 257; *Pope* v. *Wickliffe*, 7 T. B. Monr. [Ky.] 412); or to deliver

the property to the next of kin of the intestate, leaving the debts unpaid. *McNair* v. *Ragland*, 1 Dev. (N. C.) Eq. 516. And after a judgment against an administrator for payment out of specified assets, any other application of them will render him liable for a *devastavit*. *Davies* v. *Flewellen*, 29 Ga. 49. And see *Smith* v. *Jewett*, 40 N. H. 513.

But an executor or administrator cannot be charged with a *devastavit* in respect of property of which it does not appear that he ever knew the existence (*Jones* v. *Ward*, 10 Yerg. [Tenn.] 160); nor is he liable at law, as for a *devastavit*, in relation to equitable assets, unless by force of some statute (*Green* v. *Collins*, 6 Ired. [N. C.] L. 139); nor can a creditor charge as a *devastavit* an act done by his consent, and with his concurrence. *Cain* v. *Hawkins*, 5 Jones' (N. C.) L. 192. So, the husband of the executrix is not, after her death, liable for waste committed by the executrix before coverture, nor for waste committed during coverture, unless he concurred in it. *Elliott* v. *Lewis*, 3 Edw. Ch. 40. And it does not amount to a *devastavit* for an executor to lend out money of the estate, not wanted for the uses of the will, on private security, provided he exercises a fair and reasonable discretion on the subject. *Webster* v. *Spencer*, 3 Barn. & A. 360.

Executors are as much liable for loss by *non-feasance* as by *misfeasance*, and will be compelled to pay the whole amount of loss sustained by reason of their neglect. If all are equally in the wrong, the loss will be divided equally between them. *Fisher* v. *Skillman*, 18 N. J. Eq. 229. But where a widow, under a will, remains in full possession of the testator's estate, and is one of his executors, she is entitled to the possession of moneys and securities for moneys; and her co-executors are not answerable for her unjust or improvident conduct, unless they can be implicated in fraud or collusion with her. *Vanpelt* v. *Veghte*, 2 N. J. Law (Green), 207.

The husband of an executrix or administratrix is liable for all the assets received or *devastavits* committed by himself or by his wife during the coverture, and his estate remains liable after his death. *Smith* v. *Smith*, 21 Beav. 385. See *Adair* v. *Shaw*, 1 Sch. & Lef. 263; *Bachelor* v. *Bean*, 2 Vern. 61. But if the husband of a *feme covert* executrix commits a *devastavit*, and becomes bankrupt, the wife surviving is not liable. *Beynon* v. *Gollins*, 2 Bro. C. C. 323. See *Calhoun's Appeal*, 39 Penn. St. 218.

An administrator cannot be charged with a *devastavit*, where, as the representative of his intestate, he holds demands exceeding that claimed against the intestate, but may set off the demands. *Sayre* v. *Lewis*, 5 B. Mour. (Ky.) 90. So, a judgment against an executor or administrator, in his individual, and not in his representative capacity,

will not support an action founded on a *devastavit*. *Van Horn* v. *Teasdale*, 9 N. J. Law, 379.

§ 12. **For acts of each other.** When several persons are appointed executors, they are generally regarded in law as one person, and, therefore, the acts done by one, which relate to the testator's goods, such as sale, delivery, possession, etc., are considered as equivalent to the acts of all, as they possess a joint authority. *Wilkerson* v. *Wootten*, 28 Ga. 568; *Gilman* v. *Healy*, 55 Me. 120; *Hall* v. *Boyd*, 6 Penn. St. 270. But, in relation to their several responsibilities, the rule is different. One executor is not liable for the *devastavit* committed by his co-executor, nor, if one receives assets without the knowledge of the other and misapplies them, is the latter, or his estate, liable at the common law. *Irwin's Appeal*, 35 Penn. St. 294; *Hargthrope* v. *Milforth*, Cro. Eliz. 318; *Sutherland* v. *Brush*, 7 Johns. Ch. 17; *Brazer* v. *Clark*. 5 Pick. 96; *Gaultrey* v. *Nolan*, 33 Miss. 569; *Peter* v. *Beverly*, 10 Pet. 532; *Clarke* v. *Blount*, 2 Dev. (N. C.) Eq. 51; *Kerr* v. *Waters*, 19 Ga. 136; *Clarke* v. *Jenkins*, 3 Rich. (S. C.) Eq. 318; *Wood* v. *Brown*, 34 N. Y. (7 Tiff.) 337. And see *Shreve* v. *Joyce*, 36 N. J. Law, 44; 13 Am. Rep. 412. So, as it regards co-administrators, they are, in general, primarily liable only for the acts in which they respectively concur. See *Ray* v. *Doughty*, 4 Blackf. (Ind.) 115; *Sutherland* v. *Brush*, 7 Johns. Ch. 22; *State* v. *Belin*, 5 Harr. (Del.) 400; *Davis* v. *Thorn*, 6 Tex. 482. But co-administrators, who give a joint bond as security for faithful administration, are jointly liable as principals for waste committed by either, though without fault upon the part of the other. *Newton* v. *Newton*, 53 N. H. 537; *Pearson* v. *Darrington*, 32 Ala. 227; *State* v. *Hyman*, 72 N. C. 22. See *Hall* v. *Carter*, 8 Ga. 388.

The principle that where an administrator, who has the actual control or possession of assets belonging to the estate, hands over such assets to a co-administrator, the former shall be answerable for their subsequent loss, is held to be applicable where there are creditors sustaining loss by any waste of the assets. *Daly's Estate*, 1 Tuck. (N. Y.) 95. But such a rule cannot prevail if there has been any good reason why such assets should have left the custody of the one representative of the estate, and have passed into that of the other. Id. See *Townsend* v. *Barber*, 1 Dick. 356; *Moses* v. *Levi*, 3 Younge & Coll. 359.

If an executor enables his co-executor to obtain a sum of money belonging to their testator's estate, which the co-executor misapplies, such executor will not be responsible for the loss, if his co-executor could have obtained the money by his own independent act. *Candler* v. *Tillett*, 25 L. J. Ch. 505; S. C., 22 Beav. 257. But an exec-

utor will be responsible for any loss which may arise by leaving the securities of their testator in the hands of his co-executor, who was also the mortgagor, even though such co-executor was the legal and confidential adviser of the testator, in whose custody he always left his title deeds and securities. Id. See *Langford* v. *Gascoyne*, 11 Ves. 333; *Stearn* v. *Mills*, 1 N. & M. 434; S. C., 4 B. & Ad. 657; *Weetjen* v. *Vibbard*, 5 Hun (N. Y.), 265. So, where one executor is active in aiding his co-executor to commit a *devastavit*, whether intentionally or not, he will be liable with him for it. *Hall* v. *Carter*, 8 Ga. 388.

§ 13. **For acts of predecessor.** Where an administrator has died, and another has been appointed, the latter is not liable for the assets which came to the hands of his predecessor. *Atty.-Gen.* v. *Kohler*, 9 H. L. Cas. 654. He derives his title from the decedent, and not from the former executor or administrator (*Commissioners of Foreign Missions*, 27 Conn. 344); and his liability is, therefore, restricted to the goods remaining unadministered. *Spence* v. *Rutledge*, 11 Ala. 590; *Carrick* v. *Carrick*, 23 N. J. Eq. 364; *Alsop* v. *Mather*, 8 Conn. 584. As between him and his predecessors there is no privity, and he is not responsible for any *devastavit* or default of theirs. Id.; *In re Small's Estate*, 5 Penn. St. 258. See *ante*, art. 1, § 4. Nor are the representatives of a joint executor responsible for the mal-administration of the survivor, happening after the decease of the former. *Brazer* v. *Clark*, 5 Pick. 96; *Towne* v. *Ammidown*, 20 id. 535.

While an administrator *de bonis non* has power under the Georgia statute to call upon the representatives of his deceased predecessor to account with him, the heirs at law and creditors have also the same right upon a proper case made. But if the administrator *de bonis non* fails so to do, the heirs and creditors of the first intestate cannot sue the administrator *de bonis non* for this failure, unless they show that he knew of the *devastavit*, and was guilty of some special neglect, not equally chargeable upon themselves. *Bowers* v. *Grimes*, 45 Ga. 616.

§ 14. **For legacies.** The cognizance of legacies was confined in England to ecclesiastical and equity courts, and the common-law courts did not assume jurisdiction in suits for legacies, except upon an express promise by an executor, in consideration of forbearance (*Deeks* v. *Strutt*, 5 Term R. 690; *Doe* v. *Guy*, 3 East, 120; *De Witt* v. *Schoonmaker*, 2 Johns. 243, 246); or, unless there was evidence that the personal representative held the money, not as executor or administrator, but in his individual character, upon a new contract for a loan of it to him *Rundle* v. *Allison*, 34 N. Y. (7 Tiff.) 180; *Loder* v. *Hatfield*, 6 N. Y. Sup. (T. & C.) 229; S. C., 4 Hun, 36. And see *Lawton* v. *Fish*, 51 Ga. 647; *Larn* v. *Linstead*, 2 Md. Ch. 162. It has, however,

long been settled, that in the case of a *specific* legacy, after the assent of the executor thereto, the property passes to the legatee, and an action at law for the recovery of the same, upon the basis of such property being in the legatee, will lie. *Young* v. *Holmes*, 1 Stra. 70; S. C., 4 Co. 28 b; *Doe* v. *Guy*, 3 East, 120. And see *Refeld* v. *Bellette*, 14 Ark. 148; *Finch* v. *Rogers*, 11 Humph. (Tenn.) 559; *Boone* v. *Dyke*, 3 T. B. Monr. (Ky.) 529. So, an action at law for a *pecuniary* legacy has been maintained against an executor after his assent to the legacy, in the courts of some of the American States. See 1 Story's Eq. Jur., § 592, note 4. And in some of the States, an action at law is expressly given by statute. See *Farwell* v. *Jacobs*, 4 Mass. 634; *Knapp* v. *Hanford*, 6 Conn. 170; *Meecker* v. *Meecker*, 7 Johns. 99. But in the absence of any statutory provision, it may be stated as a general rule, that no action will lie at law to recover a specific legacy, unless the executor has assented thereto, or, in the case of a pecuniary legacy, unless the executor has promised to pay it; but a court of equity, regarding the executor as a trustee, will compel him to assent and pay the legacy. *Lark* v. *Linstead*, 2 Md. Ch. 162. And see *State* v. *Wilson*, 38 Md. 338; *Dunham* v. *Elford*, 13 Rich. (S. C.) Eq. 190; *Wilson* v. *Long*, 12 Serg. & R. 58; *Williams* v. *Sleusher*, 4 Chand. (Wis.) 155. The executor's assent to a legacy may be inferred from any act or expression on his part clearly recognizing the legatee's present right to receive it. *Gardner* v. *Gantt*, 19 Ala. 666. See *Murphree* v. *Singleton*, 37 id. 412.

An executor is not bound to search out a legatee. It is enough if he is always ready, when called upon to pay the legacy. A legatee, therefore, must bear the loss by depreciation upon money in the hands of an executor, which he has always been ready to pay over. *Thompson* v. *Youngblood*, 1 Bay (S. C.), 248. But if an executor pays part of a legacy made to an infant, over to the father, for the expenses of the infant's support, without a proper order of court, the mere fact that the payment was made in good faith will not protect him. *McKnight* v. *Walsh*, 23 N. J. Eq. 136.

An executor is not, however, liable to legatees for money or property which he has permitted his co-executor to receive, having no reason to believe that it was unsafe in his hands. *Robinson's Estate*, 7 Phil. (Penn.) 61. And under the laws of Pennsylvania the executor of an executor cannot be sued for a legacy under the will of the first testator. *Gilliland* v. *Bredin*, 63 Penn. St. 393.

§ 15. **Sales of lands.** At the common law, an executor or administrator had nothing to do with any thing, save the mere personal assets of the testator or intestate. See *ante*, art. 1, § 8. And it is now the law

that an administrator has no further authority, save where, by statute, he may apply to a court of competent jurisdiction, upon a proper state of facts, for the sale of the real estate of his intestate, for the payment of his debts. *Dunning* v. *Ocean Nat. Bank*, 61 N. Y. (16 Sick.) 497; 19 Am. Rep. 193; *Vaughan* v. *Deloatch*, 65 N. C. 378.

It often happens, however, that the executor derives an express authority from the will itself, which empowers him to deal with the real estate of the testator in a way to carry into effect the purposes and intents of the will; and, in general, where such a power exists, it should receive a liberal construction. See *Booraem* v. *Wells*, 4 C. E. Green (N. J.), 87; *Sorrell* v. *Ham*, 9 Ga. 55; *Farhall* v. *Farhall*, L. R., 7 Eq. 286; *Doe* v. *Shotter*, 8 Ad. & Ell. 905. By statute, in many of the States, a power given by will to executors to sell land devolves, by operation of law, upon an administrator with the will annexed. See *Peebles* v. *Watts*, 9 Dana (Ky.), 102; *Cain* v. *Matteson*, 54 N. Y. (9 Sick.) 663. But it has been held, that in the absence of any statutory authority, a power to the executor to sell land cannot, after his death, be executed by an administrator, *cum testamento annexo;* but that the power is given to the executor as a *personal* trust. *Greenough* v. *Welles*, 10 Cush. 571; *Conklin* v. *Egerton's Admr.*, 21 Wend. 430; S. C. affirmed, 25 id. 224; *Dunning* v. *Ocean Nat. Bank*, 6 Lans. 296; S. C. affirmed, 61 N. Y. (16 Sick.) 497; *Wills* v. *Cowper*, 2 Ohio, 124; *Fontain* v. *Ravenal*. 17 How. (U. S.) 369. And see *Commonwealth* v. *Forney*, 3 Watts & Serg. 353; *Ross* v. *Barclay*, 18 Penn. St. 179. So, a naked power to executors to sell does not, at common law, survive (Co Litt. 112 b, 113 a, 181 b); and the rule was, that if the testator, by his will, directed his executors by name to sell, and one of them died, the others could not sell, because the words of the testator could not be satisfied. Id.; *Osgood* v. *Franklin*, 2 Johns. Ch. 19; *Peter* v. *Beverly*, 10 Pet. (U.S.) 533. But this rule was materially qualified by the statute of 21 Hen. VIII, ch. 4, which declared that the executors who accepted their trust might sell, though one or more of the executors should refuse to act (see *Bonifaut* v. *Greenfield*, Cro. Eliz. 80); and the provisions of this statute have probably been generally adopted in this country. See *McDowell* v. *Gray*, 29 Penn. St. 211; *Ross* v. *Clore*, 3 Dana (Ky.), 195; *Taylor* v. *Morris*, 1 N. Y. (1 Comst.) 341; *Leddy* v. *Butler*, 3 Munf. (Va.) 345; *Wasson* v. *King*, 2 Dev. & Bat (N. C.) 262. If the will gives no direction to the executors to sell, but refers the power to sell to the judgment and discretion of the executors, it is held that all must join in the sale. *Walter* v. *Maunde*, 19 Ves. 424; *Cole* v. *Wade*, 16 id. 27, 44; *Bartlett* v. *Sutherland*, 24 Miss. 395; *Clay* v. *Hart*, 7 Dana (Ky.), 8, 9; 4 Kent's Com. 325, note. It is, however, held, in a recent case in Ken-

tucky, that an administrator *de bonis non* may sell land as directed by the will, although the power of the executor was discretionary. *Gulley* v. *Prather*, 7 Bush (Ky.), 167.

In Pennsylvania, when a testator directs his real estate to be sold without designating any one to execute the power, the executor cannot make a valid sale without applying to the orphan's court. *Bell's Appeal*, 66 Penn. St. 498.

Executors or administrators are not allowed, directly or indirectly, to purchase property on a sale made by them. *Stilly* v. *Rice*, 67 N. C. 178; *Fronenberger* v. *Lewis*, 70 id. 456.

The sale of lands by executors and administrators for the payment of debts, etc., being made the subject of statutory regulation in the various States, will not be further noticed in this connection. The statutes of the particular State bearing upon the subject, together with the decisions of the courts made thereunder, should be consulted.

§ 16. **For an accounting.** The responsibility of the executor or administrator for the preservation of the estate of the decedent has already been noticed to some extent. See *ante*, §§ 9, 10, 11; art. 1, §§ 9, 11.

As to the compensation of executors and administrators, see *ante*, art 1, § 16. In an English case, it is stated to be the result of all the best authorities upon the subject, "that although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the funds, in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it; yet if that line of duty is not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized; or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained; such personal representative will be liable to make it good, however unexpected the result, or however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive". Lord Cottenham, in *Clough* v. *Bond*, 3 My. & Cr. 490, 496. And see *Grayburn* v. *Clarkson*, L. R., 3 Ch. App. 605; *Phillips* v. *Phillips*, Freem. Ch. Ca. 11; *Reitz* v. *Bennett*, 6 W. Va. 416.

In general, executors and administrators, in common with other trustees, are chargeable with interest, if they have made use of the money themselves, or have been negligent, either in not paying over the money, or in not loaning or investing it, so as to render it produc-

tive. *Manning* v. *Manning*, 1 Johns. Ch. 527; *Knapp* v. *Marshall*, 56 Ill. 362; *Anderson* v. *Gregg*, 44 Miss. 170; *Hall* v. *Grover*, 25 Mich. 428; *Commonwealth* v. *Eagle Fire Ins. Co.*, 14 Allen, 344. And in some cases, courts of equity will even direct annual or other rests to be made, the effect of which will be to charge the personal representative with compound interest. *Schieffelin* v. *Stewart*, 1 Johns. Ch. 620; *King* v. *Talbot*, 50 Barb. 453; S. C. affirmed, 40 N. Y. (1 Hand) 76; *McKnight* v. *Walsh*, 8 C. E. Green (N. J.), 136; *Hook* v. *Payne*, 14 Wall. 252; *Johnson's Admr.* v. *Hedrick*, 33 Ind. 129; S. C., 5 Am. Rep. 191. But he will be only charged with the interest which he has received, or which he ought to have received, or which it is fairly to be presumed that he did receive. *Attorney-General* v. *Alford*, 4 De G., M. & G. 843. And where an executor has paid away part of the estate under a *bona fide* mistake as to the legal rights of the parties, he will not be charged with interest upon the amount ordered to be replaced. *Saltmarsh* v. *Barret*, 31 L. J. Ch. 783; S. C., 10 W. R. 640; 8 Jur. (N. S.) 737; *Bruere* v. *Pemberton*, 12 Ves. 386. The time from which interest is to be charged, in case of negligence, varies according to circumstances. See *Dunscomb* v. *Dunscomb*, 1 Johns. Ch. 508; *Ogilvie* v. *Ogilvie*, 1 Bradf. (N. Y.) 356.

Interest on money held and used by the executor for his own purposes during a protracted litigation, was held to be properly chargeable against him, although there was no order of court directing him to loan out the fund. *Grigsby* v. *Wilkinson*, 9 Bush (Ky.), 19. And see *Bruner's Appeal*, 57 Penn. St. 46.

But an executor ought not to be charged with interest on funds paid over as received without unnecessary delay, nor on his own commissions. *Parker's Estate*, 64 Penn. St. 307. And it has been held, that an administrator who withdraws money belonging to the estate, from a solvent bank, where it had been drawing, and would have continued to draw interest, when he had sufficient money to pay the debts of the estate and the expenses of administration without drawing it, does not thereby become chargeable with interest on the sum thus withdrawn; provided he does not mingle it with his own, or use it for his own profit, or deposit in a bank in his own name, or neglect to settle his account for a long time. *Estate of McQueen*, 44 Cal. 584.

An administrator will not be allowed for moneys paid out for the support of the intestate's minor children (*Latta* v. *Russ*, 8 Jones' [N. C.] L. 111); unless by virtue of a statutory provision. See *Simmons* v. *Byrd*, 49 Ga. 285. And as a general rule the personal representative is not entitled to be indemnified for counsel fees paid by

him, unless the expenditure was necessarily incurred in protecting the interests of the estate. *Garrett* v. *Garrett*, 2 Strobh. (S. C.) Eq. 272; *Modawell* v. *Holmes*, 40 Ala. 391; *Trammel* v. *Philleo*, 33 Tex. 395; *Collins* v. *Hoxie*, 9 Paige, 81; *Holmes* v. *Holmes*, 28 Vt. 765; *Gilman* v. *Gilman*, 6 N. Y. Sup. (T. & C.) 211; S. C., 4 Hun, 69. But compensation paid to auctioneers and clerks in disposing of property of the estate is properly chargeable (*Pinckard* v. *Pinckard*, 24 Ala. 250); and the estate may be charged with the expense of an agent, where the appointment of an agent is necessary in the management of the estate. *Mc Whorter* v. *Benson*, Hopk. (N. Y.) 28. See *Pearson* v. *Darrington*, 32 Ala. 227. The personal representative cannot, however, charge the estate with the expense of investigating and arranging accounts kept by himself (*Jenkins* v. *Hanahan*, 1 Cheves [S. C.], 129); nor should he be allowed for his traveling expenses, and remaining at court, etc. (*Stephenson* v. *Stephenson*, 3 Hayw. [Tenn.] 123); nor for his time and services in attending the funeral of the decedent (*Lund* v. *Lund*, 41 N. H. 355); nor for money expended by him for ardent spirits used at an auction of the goods of the deceased. *Griswold* v. *Chandler*, 5 N. H. 492. So, executors or administrators are held jointly and personally liable for the fees of an attorney employed by them in proceedings on their final accounting. *Mygatt* v. *Wilcox*, 45 N. Y. (6 Hand) 306; S. C., 6 Am. Rep. 90.

In general, executors and administrators ought to be allowed, in their accounts, all reasonable charges and disbursements for the benefit of the estate they represent, and a reasonable recompense for their personal trouble, in preference to the claims of any creditor to the estate. *Edelen* v. *Edelen*, 11 Md. 415; *Pearson* v. *Darrington*, 32 Ala. 227; *Nimmo* v. *Commonwealth*, 4 Hen. & M. (Va.) 57; *In re Wilson*, 2 Penn. St. 325. So, as a general rule, they will be held liable only for what they receive, unless lost by negligence, and they will be protected in every case where they act under professional advice. *Neff's Appeal*, 57 Penn. St. 91. An executor is not bound to account, in coin, for the amount of a debt paid him in United States treasury notes, after such notes had been declared by law to be a legal tender for debts. *Jackson* v. *Chase*, 98 Mass. 286. And see *Essex Co.* v. *Pacific Mills*, 14 Allen, 389. So, it has been held that an administrator, exercising diligence, prudence and good faith in the acceptance of currency of the late Confederate States in payment of a debt due his intestate, should be allowed a credit for it, although the currency perishes on his hands; provided he has not commingled it with his own funds or been guilty of negligence or bad faith in not paying it out. *Key* v. *Jones*, 52 Ala.

238. And where an administrator, out of Confederate money collected by him in the course of his administration, paid off specie debts of his decedent, it was held, that, in the settlement of his account, he should be credited with the debts so paid at their nominal amount. *Moss* v. *Moorman*, 24 Gratt. (Va.) 97. And see *State* v. *McAuley*, 4 Heisk. (Tenn.) 424; *State* v. *Foy*, 65 N. C. 265; *Cureton* v. *Watson*, 3 S. C. 451. And an order of court directing investments to be made in Confederate bonds and securities has been held sufficient to protect the trustee (*Trotter* v. *Trotter*, 40 Miss. 704); and so of investments made under legislative authority. *Campbell* v. *Miller*, 38 Ga. 304. But see *Hall* v. *Hall*, 43 Ala. 488; *Horn* v. *Lockhart*, 17 Wall. 570. And see generally, on this point, *Turner* v. *Turner*, 36 Tex. 41; *Wiley* v. *Wiley*, 63 N. C. 182; *Miller* v. *Gould*, 38 Ga. 465; *Adams* v. *Westbrook*, 41 Miss. 385; *Succession of Sprowl*, 21 La. Ann. 544; *Bell* v. *King*, 70 N. C. 330.

In a recent case in West Virginia, it was held that the payment of the decedent's debts created before the late civil war by the administrator, out of his own funds collected from debts due him prior to the war, in Confederate funds, at the instance and request of the widow and heirs, and with a view to save the real estate during the war, entitled him to reimbursement out of the real estate descended. *Surber* v. *Kent*, 5 W. Va. 96. An investment in Confederate securities, or the acceptance of Confederate money, at a time when a prudent man would have done the same thing in his own affairs, may excuse an executor for so acting. *Wallace* v. *Tamlin*, 42 Ga. 462.

§ 17. **Actions against each other.** In the common-law courts one executor, or administrator, cannot bring a suit against his co-executor, or co-administrator, to recover a debt which was due from the latter to the testator, or intestate (*Smith* v. *Lawrence*, 11 Paige, 206; *Sanford* v. *Sanford*, 45 N. Y. [6 Hand] 723; *Martin* v. *Martin*, 13 Mo. 37; *Cole* v. *Wooden*, 3 Harr. [N. J.] 15); and where an executor has a cause of action against his testator, it is extinguished at law on his becoming executor, and it is not competent for him to sue his co-executors for such demand. *Saunders* v. *Saunders*, 2 Litt. (Ky.) 314. Nor has an administrator power to confess judgment against his co-administrator. *Heisler* v. *Knipe*, 1 Browne (Penn.), 319.

But in equity, one executor may sue another and recover a debt due by him to their testator. *Wurts* v. *Jenkins*, 11 Barb. 546; *Soverhill* v. *Suydam*, 2 N.Y. Sup. (T. & C.) 460, 465; 59 N. Y. (14 Sick.) 140. So, one of two executors may maintain a suit in equity to call his co-executor to an account. *Wood* v. *Brown*, 34 N. Y. (7 Tiff.) 837. And see *McGregor* v. *McGregor*, 35 N.Y. (8 Tiff.) 218; *Evans* v. *Evans*, 23 N. J.

Eq. 71; *Parker* v. *Ledger*, 4 DeG. & Smale, 137; *Hughes* v. *Key*, 20 Beav. 395; *Bridgett* v. *Hames*, 1 Coll. 72. And it has likewise been held, that an executor can maintain an action at law against his joint executor on an express promise. *Phillips* v. *Phillips*, 1 Stew. (Ala.) 71. So, where two executors both died, it was held, that the executor of the one who died last might recover, from the executor of the one who died first, a bond belonging to the estate of the first testator. *Lancaster* v. *M'Bryde*, 5 Ired. (N. C.) L. 421. See, also, *Alston* v. *Jackson*, 4 id. 49. And it is held in Alabama, that an executor may maintain a suit at law against one who was his co-executor, but who had been removed, to recover the purchase-money of property bought by the latter executor at a joint sale made by them, the payment of which became due before his removal. *Hendricks* v. *Thornton*, 45 Ala. 299.

There is no privity between an administrator *de bonis non* and his predecessor, nor is either responsible to the other. *Ante*, § 13. The former, therefore, has no right to call the latter to account for money squandered or withheld, or property wasted or converted, or to sue him, except for property or choses in action remaining in his possession, *in specie*, and capable of being clearly identified as the property of the intestate. *Ante*, art. 1, § 4; *Rives* v. *Patty*, 43 Miss. 338; *Johnson* v. *Hogan*, 37 Tex. 77; *Stubblefield* v. *McRaven*, 5 Sm. & M. (Miss.) 130.

§ 18. **Judgment.** In an action against an executor on *plene administravit* pleaded, the plaintiff is bound to show affirmatively, that the defendant had goods of the testator in his hands unadministered (*Bentley* v. *Bentley*, 7 Cow. 701; *Wallace* v. *Barlow*, 3 Bibb [Ky.], 169); and though the plaintiff is entitled to his verdict if he can prove any amount unadministered, yet the measure of his damages is not the amount of his debt, but so much as he can show to remain in the hands of the executor. *Jackson* v. *Bowley*, 1 Carr. & M. 97, 102; *Harrison* v. *Beecles*, 3 Term R. 688, n. And upon the issue of *plene administravit* the jury must find specially, not only the amount of damages, but the amount of assets in the hands of the administrator or executor, for otherwise the court cannot render judgment upon the verdict. *Johnson* v. *Hawkins*, 2 Blackf. (Ind.) 459; *Forbes* v. *Scoby*, 1 Bibb (Ky.), 281; *Fairfax* v. *Fairfax*, 5 Cranch, 19. But a judgment by default against an executor or administrator is an admission of assets to the extent charged in the proceedings against him, and binds his own personal and real estate as fully as if the debt were his own. *In re Higgins*, 2 Gif. 562; S. C., 7 Jur. (N. S.) 402; *Mason* v. *Peter*, 1 Munf. (Va.) 437; *Platt* v. *Robbins*, 1 Johns. Cas. 276; *Dickson* v. *Wilkinson*, 3 How. (U.S.) 57; *Moore* v. *Martindale*, 2 Blackf. (Ind.) 353.

So of a confession of judgment. *Ruggles* v. *Sherman*, 14 Johns. 446; *People* v. *Judges of Erie*, 4 Cow. 445. And if the assets be not found, the officer may return a *devastavit*, and the plaintiff may at once issue execution *de bonis propriis*. Id. But see, *contra*, *Moore* v. *Kerr*, 10 Serg. & R. 348; *Hussey* v. *White*, id. 346. But where an administrator gives judgment by confession, which judgment is afterward reversed, he is not precluded from showing afterward a want of assets at that time. *Green* v. *Stone*, 1 Harr. & J. (Md.) 405.

In a suit against an executor or administrator in his representative capacity, the judgment must be *de bonis testatoris*, except when he pleads *ne unques executor*, or a release to himself, and the pleas are found against him. *Justices, etc.*, v. *Sloan*, 7 Ga. 31. And see *Siglar* v. *Haywood*, 8 Wheat. 675; *Jameson* v. *Martin*, 3 J. J. Marsh. (Ky.) 330; *Stone* v. *Kaufman*, 25 Ark. 186. But an action at law by a legatee, against an executor, for a legacy, on the executor's promise to pay it, must be brought against the executor in his individual, not in his representative, character; and the judgment in such case must be *de bonis propriis*. *Kayser* v. *Disher*, 9 Leigh (Va.), 357; *Pettigrew* v. *Pettigrew*, 1 Stew. (Ala.) 580. So, an administrator who gives an obligation, signing as administrator, is personally bound, and judgment is properly rendered against him *de bonis propriis* (*Carter* v. *Thomas*, 3 Ind. 213; *Ellis* v. *Merriman*, 5 B. Monr. [Ky.] 296); and so, where a cause of action is alleged to have accrued after the decease of the testator, and the executor might sue in his own right. *Moulton* v. *Wendell*, 37 N. H. 406.

A judgment against the personal representative for a debt of the decedent should direct the debt to be paid in due course of administration. *Fortson* v. *Caldwell*, 17 Tex. 627; *Racouillat* v. *Sansevain*, 32 Cal. 376; *Bull* v. *Harris*, 31 Ill. 487; *Ranney* v. *Thomas*, 45 Mo. 111. See *Guice* v. *Sellers*, 43 Miss. 52; 5 Am. Rep. 476. But a party injured by the *torts* of the personal representative has no claim on the assets of the estate for any damage sustained (*Moulson's Estate*, 1 Brewst. [Penn.] 296); nor can the personal representative claim to have the judgment in such a case, paid out of the assets of the estate. Id. See *Baugher* v. *Wilkins*, 16 Md. 35; *Johnson* v. *Gaines*, 8 Ala. 791.

A judgment in a common-law action against an executor or administrator is only a judgment against the estate and does not bind him personally. *Burd* v *McGregor*, 2 Grant's (Penn.) Cas. 353. And while such a judgment is conclusive as to the personal estate, it is only *prima facie* as to the realty. Heirs and devisees have a right to a day in court before their interests can be affected by a judgment against the administrator, and they may question and disprove any and every item

included in or constituting the judgment against the administrator, if they can; so that, in fact, the only importance of the judgment against the administrator, so far as an interest in the realty is concerned, is, that it is *prima facie* evidence of a debt due by the estate, and the foundation for a proceeding to try whether or not the realty is chargeable with it. *Steele* v. *Lineberger*, 59 Penn. St. 308; *Estate of Schroeder*, 46 Cal. 304; *Hopkins* v. *Stout*, 6 Bush (Ky.), 375. See *Langston* v. *Abney*, 43 Miss. 161; *Packwood* v. *Elliott*, id. 504.

When a personal judgment is rendered against an administrator, and it appears by record that the judgment should have been made payable in due course of administration, the court may direct it to be amended so as to make it correct, even after the adjournment of the term. *Estate of Schroeder*, 46 Cal. 304.

A judgment recovered against administrators, after they have resigned their trust, is a nullity, not binding either upon the estate or the administrator *de bonis non*. *Buckingham* v. *Owen*, 14 Miss.; 6 Sm. & Marsh. (Miss.) 502.

§ 19. **Costs.** The English rule as to the liability of executors and administrators for costs appears to have been that they must pay costs, the same as any other suitors, when cast in the suit (*Dearne* v. *Grimp*, 2 W. Bl. 1275; 1 Wms. Saund. 336 a, note); and the judgment should be given for costs *de bonis propriis*. Id. Such also, at an early period, was the rule in Massachusetts. *Hardy* v. *Call*, 16 Mass. 530. So, in New York, the general rule was maintained that executors and administrators must pay costs upon failure of the suit, the same as any other party. *Brown* v. *Lambert*, 16 Johns. 148; *Cuylers* v. *Kniffin*, 2 Wend. 243; *Barker* v. *Baker*, 5 Cow. 267. It is generally held, however, by the American cases, that if the executor or administrator proceed in good faith in bringing and prosecuting the suit, he ought not to be subjected to the payment of costs (*Sorrel* v. *Procter*, 4 Hen. & M. [Va.] 431; *Frogg* v. *Long*, 3 Dana [Ky.], 157; *Morse* v. *M'Coy*, 4 Cow. 551; *Ray* v. *Van Hook*, 9 How. [N. Y.] 427), even though he fail in the suit. Id.; *Wright* v. *Wright*, 2 McCord's (S. C.) Ch. 185; *Gibbons* v. *Johnson*, 4 Ill. 61; *Hutchcraft* v. *Gentry*, 2 J. J. Marsh. (Ky.) 499; *Van Orden* v. *Reynolds*, 18 Wend. 635. And where he prevails in the suit, either as plaintiff or defendant, he should be allowed to recover full costs, the same as any other party. See *Bockson* v. *Drinkwater*, 8 Doug. 239; *O'Hear* v. *Skeeles*, 22 Vt. 152; *Dodge* v. *Breed*, 13 Mass. 537; *Phillips* v. *Bennett*, 30 N. H. 492; *Edwards* v. *Bethel*, 1 B. & Ald. 254.

It has been laid down as a general rule of law, that if the cause of action accrues to the testator or intestate, in his life-time, the executor

or administrator, suing and failing to recover, is not liable for costs *de bonis propriis* (*Woodbridge* v. *Draper*, 15 Mo. 470; *Myers* v. *Barton*, 3 Penn. Law Jour. Rep. 257; *Bealer* v. *Myers*, 2 Bailey [S. C.], 53); but it is otherwise, if the cause of action accrues to the executor or administrator. Id. In Pennsylvania, it is a settled rule that an administrator or executor, who fails in an unjust claim, is bound to pay costs as well when he sues in his representative character, as where the cause of action arises after the death of the testator. *Show* v. *Conway*, 7 Penn. St. 136. So, if an executor omits to plead want of assets, and costs are recovered against him, they may be levied *de bonis propriis*. *Parker* v. *Stephens*, 1 Hayw. (N. C.) 219. And see *Giles* v. *Pratt*, 1 Hill (S. C.), 239; *Farley* v. *Farley*, 2 Bailey (S. C.), 319.

The subject of costs in actions by and against executors and administrators is, to a great extent, controlled by statutory provisions in the different States, and the statute of the particular State should, therefore, be consulted. As to the statutory rule in England, see Stat. 3 and 4 Will. 4, ch. 42, § 31. And see *Freeman* v. *Moyes*, 3 N. & M. 883; S. C., 1 Ad. & El. 338. If an executor commence an action, without using due diligence to ascertain that he can proceed with a reasonable prospect of success, or if he be guilty of any *laches*, so as to cause unnecessary expense or vexation to the defendant, the court will not exempt him from costs. *Wilkinson* v. *Edwards*, 1 Bing. N. C. 301; S. C., 3 Dowl P. C. 137. See, also, *Godson* v. *Freeman*, 2 Cr. M. & R. 585; *Birkhead* v. *North*, 4 Dowl. & L. 732.

§ 20. **Execution.** A judgment rendered against one as executor, who is not executor, does not bind the estate of the testator; and an execution upon such judgment could not be legally levied upon such estate. *Griffith* v. *Frazier*, 8 Cranch, 9. And see *Lewis* v. *Nichols*, 38 Tex. 54.

An administrator is held liable to an execution *de bonis propriis*, where he sues as administrator, upon a demand which arose after the death of his intestate, and upon which he might have such in his own right. *Keniston* v. *Little*, 30 N. H. 318. And after a judgment *de bonis testatoris* has been recovered at law against an administrator by default, and on the return of *nulla bona* on an execution issued thereon, judgment is rendered against him by default, *de bonis propriis*, equity will not relieve him. *Ludwig* v. *Blackinton*, 24 Me. 25.

ARTICLE III.

DEFENSES.

Section 1. In general. The same rules must apply in general to the pleadings of persons litigating in a representative character as to

those litigating in their own right. An executor or administrator cannot, therefore, object, that his estate is not bound by his admissions contained in the pleadings. *Carr* v. *Rowland*, 14 Tex. 275.

In an action against an executor or administrator, the defendant may, in addition to the ordinary defenses (see *Guild* v. *Richardson*, 6 Pick. 364; *Hicks* v. *Branton*, 21 Ark 186; *Macon, etc., R. R. Co.* v. *Davis*, 27 Ga. 113), plead *ne unques executor* (*Douglass* v. *Forrest*, 4 Bing. 686), or administrator (see *Wooldridge* v. *Bishop*, 7 B. & C. 406), or that no assets have come to his hands (*Douglass* v. *Satterlee*, 11 Johns. 16; *Mann* v. *Lang*, 5 Nev. & M. 202), or *plene administravit præter* a sum not sufficient to satisfy debts of a higher nature (1 Chit. Pl. 517), or *plene administravit* except a sum ready to be paid to the plaintiff. Id.; 1 Wms. Saund. 219 a; id. 219 b, note.

Each of these pleas will be more fully noticed in the following sections:

§ 2. **Not executor, etc.** The plea of *ne unques administrator* is a plea in bar. But, if it begin and conclude in abatement, it will be considered a plea in abatement. *The Governor* v. *Evans*, 1 Ark. 349; *Flinn* v. *Chase*, 4 Denio, 85; *Call* v. *Ewing*, 1 Blackf. (Ind.) 301. And see *Shown* v. *Barr*, 11 Ired. (N. C.) 296. A defendant sued as executor on an obligation of the deceased may plead *ne unques executor*, and *non est factum*. *Langford* v. *Frey*, 8 Humph. (Tenn.) 443. But a plea averring only that the defendant was not executor at the time suit was brought is not sufficient. It must be averred that the defendant never was executor of the last will and testament of the deceased, and that he never administered on any of the goods and chattels belonging to the deceased at the time of his death, as executor. *Lively* v. *Ballard*, 2 W. Va. 496. In an action against two executors, one cannot plead that the other is not executor. *Atkins* v. *Humphrey*, 2 C. B. 654.

If the defendant cannot dispute his being executor, he should not plead *ne unques executor*, for if he do, and the plaintiff, on the plea of *plene administravit*, take judgment of assets *quando*, and proceed to trial on the other issues, and they were found for the plaintiff, and no issue which goes to the whole cause of action is found for the defendant, the defendant will be liable to costs. 1 Chit. Pl. 518; *Hindsley* v. *Russell*, 12 East, 232; *Marshall* v. *Wilder*, 9 B. & C. 657. And see *ante*, art. 2, § 18.

§ 3. **Limitations.** It is well settled that an executor or administrator may avail himself, under the general issue, of a defense predicated upon the statute of limitations. *Sanders* v. *Robertson*, 23 Miss. 389. And the doctrine has been held in numerous cases that an

express promise by an executor or administrator to pay a debt barred by the statute will not have the effect to revive it against the estate of his testator or intestate. Id.; *Henderson* v. *Ilsley*, 11 Sm. & M. 9; *Forney* v. *Benedict*, 5 Penn. St. 225; *Patterson* v. *Cobb*, 4 Fla. 481; *Peck* v. *Botsford*, 7 Conn. 172; *Moore* v. *Hillebrant*, 14 Tex. 312; *Bunker* v. *Athearn*, 35 Me. 364; *Woodgood* v. *Bruen*, 8 N. Y. (4 Seld.) 362. But an opposite doctrine is held in many of the cases. See *Shreve* v. *Joyce*, 36 N. J. (7 Vroom) 44; S. C., 13 Am. Rep. 417; *Foster* v. *Starkey*, 12 Cush. 324; *Semmes* v. *Magruder*, 10 Md. 242; *Chambers* v. *Fennemore*, 4 Harr. (Del.) 368. And see 1 Sm. Lead. Cas. (7th Am. ed.) 971, *et seq.*

§ 4. **Set-off.** The right to set off unconnected cross demands, it is said, did not exist at common law (*Green* v. *Farmer*, 4 Burr. 2214, 2221), but was created by the English statutes of 2 Geo. II, ch. 22, and 8 Geo. II, ch. 34, which have been, with some modifications, very generally adopted in the United States. By those statutes the right was confined to mutual debts existing between the plaintiff and the defendant, and, in suits by or against an executor or administrator, to mutual debts between the testator or intestate and either party. And in the construction and application of those acts it was held, in England, that if an executor or administrator brought suit upon a debt created against the defendant after the death of the testator or intestate, or upon a debt whereon the cause of action arose after that event, the defendant could not set off a debt which existed and on which there was a cause of action against the testator or the intestate in his lifetime. *Shipman* v. *Thompson*, Willes, 103; *Tegetmeyer* v. *Lumley*, id. 264, notes; *Rees* v. *Watts*, 11 Exch. 410; *Mardall* v. *Thellusson*, 6 El. & Bl. 976. And this construction has been adopted as a good rule for judicial action under similar statutes in this country. *Root* v. *Taylor*, 20 Johns. 137; *Hills* v. *Tallman's Admr.*, 21 Wend. 674; *Woodward* v. *McGaugh*, 8 Mo. 161; *Newhall* v. *Turney*, 14 Ill. 338; *Mellen* v. *Boarman*, 21 Miss. 100.

In an action by an administrator as such, the defendant cannot file, in offset to the plaintiff's claim, a demand against him in another capacity. *Lawson* v. *Fischer*, 5 Ark. 52; *Tate* v. *Chandler*, 4 Stew. & P. (Ala.) 417. And a creditor of an intestate, purchasing part of the intestate's goods from his administrator, cannot set off the amount against a debt due to him from the intestate at his decease. *Lambarde* v *Older*, 17 Beav. 542; *Hall* v. *Hall*, 11 Tex. 526; *Cotton* v. *Parker*, 1 Sm. & M. (Miss.) Ch. 191.

But, it has been held that, to an action against an executor, on an account stated by him as executor, a set-off for debts due from the

plaintiff to the testator in his life-time may be pleaded. *Brakesley* v. *Smallwood*, 8 Q. B. 538. And in an action by the executor or administrator to recover a debt due to his testator or intestate, the defendant may file in set off a demand for money paid by him to defray the funeral expenses of the deceased. *Adams* v. *Butts*, 16 Pick. 343; *Patterson* v. *Patterson*, 59 N. Y. (14 Sick.) 574; 17 Am Rep. 384.

So, it has been held, that where a suit is brought by the administrator of one intestate against the administrator of another intestate. for a debt due from the intestate of one to the intestate of another, in their life-time, the defendant may set off a debt due from the plaintiff's intestate to his intestate. *Barnard* v. *Jordon*, 3 Ired. (N. C.) L. 268. That a set-off is not a defense, see *Curran* v. *Curran*, 40 Ind. 473.

§ 5. **No assets.** See *ante*, art. 2, § 18. The plea of "no assets" is substantially the same as the plea of "*plene administravit.*" *Young* v. *Whitaker*, 1 A. K. Marsh. (Ky.) 398. As to the latter plea, see following section.

§ 6. **Fully administered.** A neglect to plead *plene administravi*, by an executor or administrator is an admission of assets (*Huger* v. *Dawson*, 3 Rich. [S. C.] 328; 1 Wms. Saund. 219 b, 335, note 10), and renders him liable out of the assets, if any, or if not any, then personally, if the plaintiff obtain judgment for his debt. Id. See *Yardley* v. *Arnold*, 1 Carr. & M. 434. But the defendant is only liable to the amount of assets proved to be in his hands, though less than the debt. *Harrison* v. *Beecles*, cited 3 Term R. 688; *ante*, art. 2, § 18. The court, in its discretion, will permit an administrator to add to the general issue the plea of *plene administravit.* *Sawyer* v. *Sexton*, 1 Tayl. (N. C.) 137; 2 Hayw. 67. If there be several executors defendants, who join in this plea, it seems that the plaintiff may succeed against one only, who is shown to have assets (1 Wms. Saund. 336, note; *Parsons* v. *Hancock*, 1 Moody & M. 330); and if one of several executors plead no assets, and be defeated, he alone is liable. Id.; 2 Chit. Pl. (16th Am. ed.) 384. See *Moore* v. *Tandy*, 3 Bibb (Ky.), 97.

In Connecticut, *plene administravit* is not a good plea to an action against an administrator for a debt of his intestate (*Olcott* v. *Graham*, Kirby, 246); and since the New York Revised Statutes, it is no longer a good plea in New York. *Allen* v. *Bishop*, 25 Wend. 415. But it may be pleaded by executors and administrators, in New Jersey, although, in consequence of statutory provisions in the State, it may not be available under precisely the same circumstances, nor to the same extent, as at common law. *Haines* v. *Price*, 20 N. J. Law, 480.

And see *Sergeant* v. *Ewing*, 30 Penn. St. 75; *Bryan* v. *Miller*, 10 Ired. (N. C.) L. 129; *White* v. *Archbill*, 2 Sneed (Tenn.), 588.

Where the plea of "fully administered" is found for the defendant, and a judgment *quando* rendered for the plaintiff, the defendant is entitled to judgment against the plaintiff for costs. *Lewis* v. *Johnston*, 67 N. C. 38.

CHAPTER LXIV.

FACTORS, BROKERS AND COMMISSION MERCHANTS.

TITLE I.

OF BROKERS.

ARTICLE I.

OF BROKERS IN GENERAL.

Section 1. Definition and nature. The matters to be discussed in this chapter constitute a subdivision of the general subject of agency. That subject has been treated at large in a previous volume. See Vol. 1, title *Agency*. The present purpose is to illustrate the manner in which the principles there stated are applied to the special classes of agents named, and to limit and define the rights, duties and liabilities which appertain to their employments.

A broker is a special agent employed as a middleman or negotiator between parties. Story on Agency, § 28; *Hinckley* v. *Arey*, 27 Me. 362; *Saladin* v. *Mitchell*, 45 Ill. 79, 83, Breese, J.; Wharton on Agency, § 695. In the language of Lord Chief Justice Tindal "a broker is one who makes a bargain for another and receives a commission for so doing." *Pott* v. *Turner*, 6 Bing. 702, 706. The business of a factor and a broker is in many respects unlike, and in some similar. They are both agents of the owner to sell property. A broker, however, is not usually intrusted with the custody of the property, and he is not authorized to buy or sell in his own name. He has, therefore, while acting simply as a broker no lien upon the property. *Saladin* v. *Mitchell*, 45 Ill. 79; *Baring* v. *Corrie*, 2 B. & Ald. 137, 143.

He is authorized to negotiate that contract to which his principal has agreed and no other. *Coddington* v. *Goddard*, 82 Mass. 436, 445; *Scott* v. *Rogers*, 31 N. Y. (4 Tiff.) 676; 4 Abb. Ct. App. 157, and cases cited in opinion of Balcom, J., id. 163, n. Thus, where a broker, who was instructed to buy fifty bales of cotton, bought three hundred to cover other transactions, it was held that this was not the contract

he was authorized to make, nor was it a contract upon which the principal could sue, and the broker was liable for the purchase-price paid to him by the principal. *Bostwick* v. *Jardine*, 34 L. J. Exch. 142. And see *Heyworth* v. *Knight*, 17 C. B. (N. S.) 298; 33 L. J. C. P. 298; 10 Jur. (N. S.) 866. Nor is this principle affected by the fact that the contract made is more advantageous for the principal; for the agent has no authority to vary the terms of the contract, since every man has a right to decide for himself how his business shall be conducted. *Nesbitt* v. *Helser*, 49 Mo. 383. A broker, therefore, is entitled to definite instructions, and if the principal gives an order in such uncertain terms as to be susceptible of two different meanings, and the agent *bona fide* adopts one of them and acts upon it, it is not competent for the principal to repudiate the act as unauthorized (*Ireland* v. *Livingston*, L. R., 5 H. L. Cas. 395); and where instructions are obscure or contradictory, it has been said that the broker may exercise his honest and diligent discretion without becoming liable for results. *Bessent* v. *Harris*, 63 N. C. 542. See *Greenleaf* v. *Moody*, 13 Allen, 363. So where unforeseen events render it impossible to follow instructions the agent is remitted to his discretion. *Smith* v. *Cologan*, 2 Term R. 188, note *a*; *Callendar* v. *Dittrich*, 4 Man. & Gr. 68; *Chapman* v. *Walton*, 10 Bing. 57; *Forrestier* v. *Bordman*, 1 Story, 43, 51; *Greenleaf* v. *Moody*, 13 Allen (Mass.), 363, 367. See, also, *Feild* v. *Farrington*, 10 Wall. 141; *Wand* v. *Bledsoe*, 32 Tex. 251.

While the authority of a broker is limited by the special instructions of the principal, it is important to remember that in the absence of specific directions there is an implied authority to deal according to the usage of the particular business at the time and place of the employment. *Robinson* v. *Mollett*, 44 L. J. C. P. 362; S. C. on appeal, Exch. Chamb., L. R., 6 C. P. 84; 41 L. J. C. P. 65; L. R., 5 C. P. 646; 39 L. J. C. P. 290; *Maxtel* v. *Paine*, 4 L. J. Exch. 210; *Rosenstock* v. *Tormey*, 32 Md. 169; 3 Am. Rep. 125; *Fairlie* v. *Fenton*, 39 L. J. Exch. 107; *Peckham* v. *Ketchum*, 5 Bosw. 506; *Sumner* v. *Stewart*, 69 Penn. St. 321; *Horton* v. *Morgan*, 19 N. Y. (5 Smith) 170; S. C., 6 Duer, 56; Wharton on Agency, § 696. But this, like other implied authorities, is limited to such usages as are not unreasonable or contrary to the rules of law. *Farnsworth* v. *Hemmer*, 1 Allen (Mass.), 494; *Evans* v. *Waln*, 71 Penn. St. 69. Thus, a custom which converts a broker employed to buy into a principal selling for himself, and thereby giving him an interest wholly opposed to his duty, is not such a custom as will bind an employer who was ignorant of its existence (*Robinson* v. *Mollett*, 44 L. J. C. P. 362; L. R., 6 C. P. 84; 41 L. J. C. P. 65; L. R., 5 C. P. 646; 39 L. J. C. P. 290); nor can a custom be received to

establish a broker's right to receive the price of goods sold by him, the possession of which he did not have, and did not deliver (*Higgins* v. *Moore*, 34 N. Y. [7 Tiff.] 417), or to sell commercial paper pledged as security at private sale (*Wheeler* v. *Newbould*, 16 N. Y. [2 Smith] 392), or to sell without notice (*Markham* v. *Jaudon*, 41 N. Y. [2 Hand] 235), or to overcome explicit instructions. *Scott* v. *Rogers*, 31 N. Y. (4 Tiff.) 676; *Pierce* v. *Thomas*, 4 E. D. Smith, 354.

But a usage, by which the seller of property is held liable to pay a commission to a broker whose services he has accepted, and who has introduced him to and brought him into negotiation with an ultimate buyer, and who is ready to continue his services until a sale is completed, is a reasonable usage. There is nothing unreasonable in allowing a commission to be recovered for such services accepted and rendered, independently of the question whether the sale is finally effected by the same or by another broker. *Loud* v. *Hall*, 106 Mass. 404.

The rule that an agent cannot delegate his authority applies to a broker (*Cockran* v. *Irlam*, 2 Maule & S. 301); but he need not necessarily act by his own hand. He may employ a clerk, and in some instances, by usage or necessity, a sub-agent. *Commercial Bank, etc.*, v. *Norton*, 1 Hill, 501, 505; *Elwell* v. *Chamberlain*, 2 Bosw. 230.

§ 2. **Broker's powers and duties as to employer.** A broker is required to employ in his principal's service the diligence and skill which good business men of the same grade and locality are accustomed to apply under similar circumstances. *Ante*, Vol. 1, title *Agency*, pp. 235, 240. He cannot dispute the title of his principal (*Jones* v. *Dwyer*, 15 East, 21; *Roberts* v. *Ogilby*, 9 Price, 269; *Ross* v. *Curtis*, 31 N. Y. [4 Tiff.] 606); but when the title is claimed by third parties the agent may protect himself by an interpleader. *McKay* v. *Draper*, 27 N. Y. (13 Smith) 256. He cannot occupy a position adverse to the interests of his principal, and hence he cannot act both for the principal and for himself in the same transaction by being both buyer and seller of property. *Ante*, Vol. 1, title *Agency*, pp. 245, 246. So a stock broker employed to purchase stock for a customer cannot buy of himself (*Taussig* v. *Hart*, 58 N. Y. [13 Sick.] 425), nor can he sell to a firm of which he is a member. *Martin* v. *Moulton*, 8 N. H. 504. So the clerk of a broker who has access to the broker's correspondence with his principal, sustains such a trust relation that he has no right to buy land which the broker is employed to sell, and if he does, he will hold as trustee for the principal. *Gardner* v. *Ogden*, 22 N. Y. (7 Smith) 327. A broker acts in a representative capacity, hence every benefit he derives beyond the proper compensation inures to the principal. *Hidden* v.

Waldo, 55 N. Y. (10 Sick.) 294. See *ante*, Vol. 1, title *Agency*, p. 249. Except, as we shall presently see, in the instance of signing a contract within the statute of frauds, a broker cannot act both for the purchaser and the seller. *Raisin* v. *Clark*, 41 Md. 158; 20 Am. Rep. 66; *Everhart* v. *Searle*, 71 Penn. St. 256; *Cassard* v. *Hinman*, 6 Bosw. 8; *Pugsley* v. *Murray*, 4 E. D. Smith, 245; *Dunlop* v. *Richards*, 2 id. 181; *Grant* v. *Hardy*, 33 Wis. 668; *ante*, Vol. 1, title *Agency*, pp. 247, 248. And a broker acting for both parties in effecting an exchange of property can recover compensation from neither, unless his double employment was known and assented to by both. *Rice* v. *Wood*, 113 Mass. 133; S. C., 18 Am. Rep. 459. And see *Raisin* v. *Clark*, 41 Md. 158; 20 Am. Rep. 66. The law requires of an agent that he should disclose to his principal all the information in his possession in reference to the transaction in which he is engaged; hence a concealment of his dual agency from one of the parties would be a fraud upon the other. Story on Agency, § 31. When the mutual agency is disclosed and the parties contract with a knowledge of it, the rule ceases to apply, and the broker may properly act for both parties. *Spyer* v. *Fisher*, 5 Jones & Sp. 93; *Rowe* v. *Stevens*, 3 id. 189; S. C. affirmed, 53 N. Y. (8 Sick.) 621.

It has been held that a broker having power to sell goods without any express restriction as to the mode, may sell by sample or with warranty (*Andrews* v. *Kneeland*, 6 Cow. 354; *Boorman* v. *Johnston*, 12 Wend. 566; *Waring* v. *Mason*, 18 Wend. 425. See *Randall* v. *Kehlor*, 60 Me. 37; Story on Agency, §§ 59, 60, 109); but the more approved rule is, that, in the absence of instructions, the broker cannot bind his principal by warranty except in cases where such is the usual and customary mode of sale. *Upton* v. *Suffolk Co. Mills*, 11 Cush. (Mass.) 586; *The Monte Allegre*, 9 Wheat. 644; *Helyear* v. *Hawke*, 5 Esp. 72; *Gibson* v. *Colt*, 7 Johns. 390; 1 Pars. on Cont. (5th ed.) 60; Wharton on Agency, § 710. *Contra: Dodd* v. *Farlow*, 11 Allen, 426. So an authority to sell stocks — a species of property not usually sold with warranty — does not imply a power to bind the owner by the collateral contract of warranty. *Smith* v. *Tracy*, 36 N. Y. (9 Tiff.) 79. So an authority to sell a thing which is sometimes sold with and sometimes without warranty does not confer the right to warrant. *Brady* v. *Todd*, 9 C. B. (N. S.) 592.

Where a broker to sell has power to sign a contract, if the contract signed by him varies from the instructions given by his principal, it will not be specifically enforced against the latter. *Morris* v. *Ruddy*, 20 N. J. Eq. 236.

A broker, ordinarily, has no authority to sell in his own name, or to

receive payment for property sold by him (*Baring* v. *Corrie*, 2 B. & Ald. 137, 143; *Bryce* v. *Brooks*, 26 Wend. 367); and if payment is made to him by the purchaser it is at his own risk, unless the authority can be fairly inferred. *Higgins* v. *Moore*, 34 N. Y. (9 Tiff.) 417; reversing S. C., 6 Bosw. 344; *Dunn* v. *Wright*, 51 Barb. 244; *Bassett* v. *Lederer*, 3 N. Y. Sup. (T. & C.) 671; S. C., 1 Hun, 274; *R. R. Co.* v. *Roberts*, 4 Phila. (Penn.) 110; *Graham* v. *Duckwall*, 8 Bush (Ky.), 12; *Rutenberg* v. *Winchester*, 47 Cal. 213. But when the principal invests the broker with the possession of the goods or the evidence of title to them, so that the broker is clothed with the apparent ownership upon which purchasers rely in good faith, payments made to the broker will protect them against claims of the true owner. *McNeil* v. *Tenth Nat. Bank*, 46 N. Y. (1 Sick.) 325; *Clarke* v. *Meigs*, 10 Bosw. 337; *Bassett* v. *Lederer*, 1 Hun, 274; 3 N. Y. Sup. (T. & C.) 671; *Parsons* v. *Martin*, 11 Gray, 111; *Lentilhon* v. *Vorweck*, Hill & Den. 443; *Capel* v. *Thornton*, 3 Carr. & P. 352; *Pickering* v. *Busk*, 15 East, 38. So, if the seller lets the day of payment go by, he may lead the principal into the supposition that he relies solely on the broker, and if, in that case, the price of the goods has been paid to the broker, on account of this deception, the principal is discharged. *Kymer* v. *Suwercropp* 1 Camp. 109.

An authority to a broker to buy and load upon a vessel a cargo of produce does not, by implication and in the absence of any sufficient custom, give to the agent the power to borrow, upon the credit of the principal, the money with which to make the purchase (*Bank of the State of Indiana* v. *Bugbee*, 1 Abb. Ct. App. 86); nor has a broker power to pledge (*Fisher* v. *Brown*, 104 Mass. 259; 6 Am. Rep. 235); and at common law the possession of the goods by a broker conferred no power on him to pledge the property to secure his own debt (*Bragg* v. *Meyer*, 1 Me. 408); or to make any submission to arbitration which will be binding on his principal. *Ingraham* v. *Whitmore*, 75 Ill. 24.

It has already been noted that the rule that the broker cannot act for both parties is subject to an exception. For the purpose of making a contract of sale within the statute of frauds, the broker may be the agent of both parties. *Coddington* v. *Goddard*, 16 Gray, 442; *Evans* v. *Waln*, 71 Penn. St. 69; *Hinckley* v. *Arey*, 27 Me. 362; Benj. on Sales, § 273. Where a broker has made a bargain he should reduce it to writing and deliver to each party a copy of the terms. The one delivered to the buyer is termed the bought note, that to the seller, the sold note. He ought also to enter them in his book and sign the entry. These notes may vary in form. See usual forms stated at length in Benj. on Sales, § 276, *et seq.* When they disclose upon their face the fact

that the broker is acting representatively, he binds his principal and incurs no personal liability, but when he assumes to act personally, he cannot escape by parol proof that he was acting only as agent for another, although the party to whom he gives such a note is at liberty to show that there was an unnamed principal responsible. See *Thompson* v. *Davenport*, 2 Smith's Lead. Cas. 351; *Higgins* v. *Senior*, 8 M. & W. 834; *Williams* v. *Bacon*, 2 Gray, 387; *Fuller* v. *Hooper*, 3 id. 341; *Eastern R. R.* v. *Benedict*, 5 id. 561; *Dykers* v. *Townsend*, 24 N. Y. (10 Smith) 57.

When the broker has made an entry of the contract and has also executed the bought and sold notes, there will exist three memoranda of the contract. If these differ, it is essential to ascertain which is controlling. It appears to be the prevailing opinion that the broker's signed entry in his book constitutes the contract between the parties. *Heyman* v. *Neale*, 2 Camp. 337; *Thornton* v. *Charles*, 9 M. & W. 802; *Sievewright* v. *Archibald*, 17 Q. B. 103; 20 L. J. Q. B. 529. But see *Cumming* v. *Roebuck*, Holt. 172; *Thornton* v. *Meux*, M. & M. 43; *Waring* v. *Mason*, 18 Wend. 425. When the memoranda in the broker's book is not signed, and the broker is employed by one party and does not act for the other, the memoranda is not the contract, and the contract may be proved by parol. *Allen* v. *Aguirre*, 7 N. Y. (3 Seld.) 543.

The bought and sold notes do not constitute the contract, but when they correspond and state all the terms of the bargain, they are sufficient evidence to satisfy the statute, although there be no entry in the broker's book, or only an unsigned entry. *Sievewright* v. *Archibald*, 17 Q. B. 103; 20 L. J. Q. B. 529; 15 Jur. 947; *Thornton* v. *Charles*, 9 M. & W. 802; *Heyman* v. *Neale*, 2 Camp. 337. See *Goom* v. *Aflalo*, 6 B. & C. 117. In case of variance between the bought and sold notes on the one side, and the signed entry in the book on the other side, it is a question of fact for the jury whether the acceptance of the bought and sold notes constitutes evidence of a new contract modifying that of the book entry. *Hawes* v. *Forster*, 1 M. & R. 368; *Thornton* v. *Charles*, 9 M. & W. 802; *Sievewright* v. *Archibald*, 17 Q. B. 117. But when the bought and sold notes vary, and there are no writings (either by book entry or otherwise), to show the terms, then there is no valid contract. *Thornton* v. *Kempster*, 5 Taunt. 786; *Cumming* v. *Roebuck*, Holt. 172; *Thornton* v. *Meux*, 1 M. & M. 43; *Townend* v. *Drakeford*, 1 C. & K. 20; *Fesenden* v. *Levy*, 11 W. R. 258; *Grant* v. *Fletcher*, 5 B. & C. 436; *Gregson* v. *Ruck*, 4 Q. B. 737; *Sievewright* v. *Archibald*, 17 Q. B. 115; *Suydam* v. *Clark*, 2 Sand. 133; *Davis* v. *Shields*, 26 Wend. 341.

§ 3. **Broker's powers and duties as to third persons.** A broker, like every other agent while dealing within the scope of his authority, binds the principal and protects the persons dealing with him. See *ante*, Vol. 1, 220, title *Agency*.

Any one dealing with a person whom he knows to be a broker, may be presumed to know, from the nature of a broker's business, that he is acting as agent for some third person. *Baxter* v. *Duren*, 29 Me. 434. But it is, of course, competent for a broker to make himself personally liable on his contracts for his principal. *Higgings* v. *Senior*, 8 M. & W. 834. And see *post*, § 5. Whenever a broker enters into a contract as broker, describing himself as such, and naming his principal, he cannot maintain an action in his own name on the contract. *Fairlie* v. *Fenton*, L. R., 5 Exch. 169; 39 L. J. Exch. 107; *Fawker* v. *Lamb*, 31 id. 98; *White* v. *Chouteau*, 10 Barb. 202, 208. But where the broker makes the contract in such a form that he declares himself to be the contracting party, he may maintain the action in his own name (*Morgan* v. *Reid*, 7 Abb. 215; *Newcomb* v. *Clark*, 1 Den. 226); and under the Code practice either the principal or the broker may sue *Erickson* v. *Compton*, 6 How. 471.

§ 5. **Broker's liability to employer.** A broker is bound to possess and to exercise proper knowledge and skill, and to act with the utmost good faith. See title *Agency*, Vol. 1, p. 249.

If he makes an unauthorized transfer of the property he is liable for a conversion. *Baker* v. *Drake*, 53 N. Y. (8 Sick.) 211; 13 Am. Rep. 507. See S. C., 66 N. Y. (21 Sick.) 518; *Scott* v. *Rogers*, 31 N. Y. (4 Tiff.) 676; *Anonymous*, 12 Mod. 602; *Syed* v. *Hay*, 4 Term R. 260, 264. But when being authorized to sell at a given price, he sells at a lower price, he is liable for misconduct, but not for a conversion (*Laverty* v. *Suethan*, 53 How. Pr. [N. Y.] 152); and when the broker makes an unauthorized purchase the principal may repudiate the contract, and sue to recover the money advanced to make the purchase. *Voris* v. *McCredy*, 16 How. Pr. 87.

A broker is bound to keep accurate accounts of his proceedings and to render an account to his principal. *Clark* v. *Moody*, 17 Mass. 145; 1 Am. Lead. Cas. 836. And see *post*, title 2, § 4.

If he neglects to account within a reasonable time he is probably liable to a suit without a previous demand (*Haas* v. *Damon*, 9 Iowa, 589); and where a demand would be impracticable, or highly inconvenient, a suit may be brought without it (PARKER, J.—*Clark* v. *Moody*, 17 Mass. 145, 150); but in general an action cannot be maintained against a broker for moneys received by him until after a demand has been made upon him, or until he has been directed to

make remittances. *Ferris* v. *Paris*, 10 Johns. 285; *Cooley* v. *Betts*, 24 Wend. 203. See title *Agency*, Vol. 1, p. 253.

§ 4. **Broker's liability to third persons.** Contracts executed by a broker as such on behalf of a disclosed principal create no personal liability on the part of the broker. *Ante*, title *Agency*, Vol. 1, p. 256. "No rule of law," says Lord ELDON, "is better ascertained or stands upon a stronger foundation than this." *Ex parte Hartop*, 12 Ves. 349, 352.

But when the broker makes the contract in such a form that he declares himself to be the contracting party, he thereby creates a personal liability, and both he and the principal may be sued at the election of the other contracting party. *Higgins* v. *Senior*, 8 M. & W. 834; *Jones* v. *Littledale*, 6 A. & E. 486; *Calder* v. *Dobell*, L. R., 6 C. P. 486; *Youghiogheny Iron & Coal Co.* v. *Smith*, 66 Penn. St. 340; *Baldwin* v. *Leonard*, 39 Vt. 260; *Wheeler* v. *Reed*, 36 Ill. 81; *Baltzen* v. *Nicolay*, 53 N. Y. (8 Sick.) 469. Where the broker signs the contract in his own name without qualification, he is *prima facie* to be deemed the contracting party. See *Gadd* v. *Houghton*, L. R., 1 Exch. Div. 357; *Paice* v. *Walker*, L. R., 5 Exch. 173. See *Thompson* v. *Davenport*, 1 Smith's Lead. Cas. 351. But where the contract is made "as agent," or "on behalf of" a disclosed principal, although the contract is signed by the agent in his own name, he is not personally liable. *Gadd* v. *Houghton*, L. R., 1 Exch. Div. 357; *Cropper* v. *Cook*, L.R., 3 C. P. 194; *Paice* v. *Walker*, L. R., 5 Exch. 173; *Southwell* v. *Bowditch*, L. R., 1 C. P. Div. 374; reversing S. C., id. 100. The English authorities support the rule that where the maker acts as such and discloses the agency, although the principal is not named, in the absence of usage making the broker personally liable, he cannot be charged on the contract. *Southwell* v. *Bowditch*, *supra*. In the case last cited the contract was in the following terms: "I have this day sold by your order and for your account to my principals," and signed by the defendant in his own name. Held on appeal that the broker was not personally liable. "There are two ways," says JESSEL, M. R., "in which a broker can be made liable: First, intention in the face of the contract making the agent liable as well as the principal; secondly, usage." Id. 377. And see *Fleet* v. *Murton*, L. R., 7 Q. B. 126; 1 Eng. R. 32. The American rule has been stated differently. Thus, HOFFMAN, J., in *Morrison* v. *Currie*, 4 Duer, 79, 85, says: "Where a person sells property, stating that he acts for another, but does not disclose the name of the principal, he makes himself responsible to the purchaser in any way in which the actual principal would be liable; but that he may exonerate himself from such liability by showing a payment over

to his principal, or other special circumstances attending the transaction proving that it would be inequitable as between the parties to hold him responsible." And such has been in substance the language employed by judges and text writers of great authority. See *Mills* v. *Hunt*, 20 Wend. 431, 434; *Mauri* v. *Heffernan*, 13 Johns. 58; *Rathbun* v. *Budlong*, 1 Am. Lead. Cas. 635, 636; Story on Agency, § 267. The distinction, however, between a disclosure of an agency in the contract under which the principal, although not named, is capable of identification, and which puts the other contracting party upon notice of such agency, and a failure to disclose any principal at all, is to be borne in mind in the application of the rule as stated above. See *Lyon* v. *Williams*, 5 Gray, 557. But the fact that the broker is such, and is known to be such, will make no difference, unless the relation is disclosed in the contract. *Waring* v. *Mason*, 18 Wend. 426, 435; *Rathbun* v. *Budlong*, 1 Am. Lead. Cas. 636.

Where a person deals with another, knowing him to be a broker, although the name of the principal is not disclosed, the person so dealing cannot set off a claim due from the broker to him in an action brought by the principal for the purchase-price. *Bliss* v. *Bliss*, 7 Bosw. 339; *Hogan* v. *Shorb*, 24 Wend. 458; *Evans* v. *Waln*, 71 Penn. St. 69.

A broker may also become personally liable where he acts wrongfully or exceeds his authority. 1 Am. Lead. Cas. 767. The ground of this liability is said to rest upon an implied warranty of his authority to act as agent, and the remedy is by an action for the breach. *Balttzen* v. *Nicollay*, 53 N. Y. (8 Sick.) 467; *Dung* v. *Parker*, 52 N.Y. (7 Sick.) 494; *Smout* v. *Ilbery*, 10 M. & W. 1. Whether a broker who makes a sale of goods fraudulently obtained by his principal will be liable in action of trover by the real owner was determined in the affirmative by an equally divided court in exchequer chamber in the case of *Fowler* v. *H—ns*, L. R., 7 Q. B. 616; 3 Eng. Rep. 232.

§ 6. **Compensation.** The compensation which a broker receives for his services is ordinarily a commission on the price or value of the thing sold or exchanged. A salaried agent who does not act for a fee or rate per cent is not a broker. *Portland* v. *O'Neill*, 1 Oreg. 218. The broker's right to commission will depend upon the terms of his employment and the performance of the service. The relation is one of contract, and the contract must be established. *Pierce* v. *Thomas*, 4 E. D. Smith, 354; *Goodspeed* v. *Robinson*, 1 Hilt. 423. This he may do either by showing a previous authority, or the acceptance of his agency and the adoption of his acts. *Keys* v. *Johnson*, 68 Penn. St. 42.

Until the broker has faithfully discharged the obligation assumed in the contract with his principal he is not entitled to the agreed commissions. *Jacobs* v. *Kolff*, 2 Hilt. 133; *Barnard* v. *Monnot*, 34 Barb. 90; *Barnes* v. *Roberts*, 5 Bosw. 73; *McGavock* v. *Woodlief*, 20 How. (U. S.) 221; *Broad* v. *Thomas*, 7 Bing. 99; *Read* v. *Rann*, 10 Barn. & C. 438.

If the broker accepts an employment that makes his right to commissions dependent upon his procuring a purchaser on specified terms, or within a specified time, he cannot recover if he does not perform that service unless the employer interferes and prevents performance (*Briggs* v. *Rowe*, 1 Abb. Ct. App. 189; *Satterthwaite* v. *Vreeland*, 3 Hun, 152; *Jacobs* v. *Kolff*, 2 Hilt. 133; *Holley* v. *Townsend*, id. 34), or unless the employer waives the specific provision of the employment and accepts the broker's service. *Keys* v. *Johnson*, 68 Penn. St. 42; *Clendenon* v. *Pancoast*, 75 id. 213; *Barnes* v. *Roberts*, 5 Bosw. 73; *Corning* v. *Calvert*, 2 Hilt. 56; *Van Lien* v. *Byrnes*, 1 id. 133; *Howland* v. *Coffin*, 47 Barb. 653.

But where the broker is employed to assist in making a certain sale of property at an agreed compensation in case the sale is made, and has opened negotiations with a purchaser on the authorized terms, the principal cannot defeat the broker's right to commissions by changing the terms of the sale so as to dispense with the broker's services without notice. *Bash* v. *Hill*, 62 Ill. 216; *Morgan* v. *Mason*, 4 E. D. Smith, 636; *Chilton* v. *Butler*, 1 id. 150; *Martin* v. *Silliman*, 53 N. Y. (8 Sick.) 615.

But this does not prevent the employer from negotiating and selling the property himself without liability for commissions, provided the purchaser is found without the instrumentality of the broker. *McClave* v. *Paine*, 49 N. Y. (4 Sick.) 561; *Sussdorff* v. *Schmidt*, 55 N. Y. (10 Sick.) 319.

To earn his commission the broker must be the efficient agent in or the procuring cause of the contract. *Lloyd* v. *Mathews*, 51 N. Y. (6 Sick.) 124; *Thornal* v. *Pitt*, 58 N. Y. (13 Sick.) 683; *Sussdorf* v. *Schmidt*, 55 N. Y. (10 Sick.) 319.

The fact that a loan is procured in consequence of a third person unconnected with the agent having heard of the required loan from a person to whom it was proposed by the agent but rejected, will not entitle the agent to commissions. *Antrobus* v. *Wickens*, 4 Fost. & Fin. N. P. Cas. 291. But see *Lincoln* v. *McClatchie*, 36 Conn. 136.

It is not necessary that the broker should negotiate or be present at the sale if his services are the procuring cause of the sale, nor need

the purchaser be made known to the owner as the broker's customer, if he is so in fact. *Lloyd* v. *Matthews*, 51 N. Y. (6 Sick.) 124. See *Bornstein* v. *Lans*, 104 Mass. 214.

If after the property is placed in the broker's hands the sale is brought about or procured by his exertions, he will be entitled to his commissions; or if the agent introduces the purchaser or discloses his name to the seller, and through such introduction or disclosure negotiations are begun and the sale of the property is effected, the agent is entitled to his commissions though the sale be made by the owner (*Tyler* v. *Parr*, 52 Mo. 249; *Bell* v. *Kaiser*, 50 id. 150; *Lyon* v. *Mitchell*, 36 N. Y. [9 Tiff.] 235; *Barnard* v. *Monnott*, 3 Keyes, 203; S. C., 1 Abb. Ct. App. 108; *Moses* v. *Bierling*, 31 N. Y. [4 Tiff.] 462; *Redfield* v, *Tegg*, 38 N. Y. [11 Tiff.] 212; *McClave* v. *Paine*, 49 N. Y. [4 Sick.] 561; *Jones* v. *Adler*, 34 Md. 440; *Hands* v. *Henry*, 36 N. J. L. 328; *Durkee* v. *Vt. Cent. R. R.*, 29 Vt. 127); and where the broker produces a party ready and able to make the purchase at a satisfactory price, the principal cannot relieve himself from liability by a capricious refusal to consummate the sale, or by a voluntary act of his own disabling him from performance. *Glentworth* v. *Luther*, 21 Barb. 145; *Kick* v. *Emmerling*, 22 How. (U. S.) 69; *Van Lien* v. *Byrnes*, 1 Hilt. 134; *Holly* v. *Gosling*, 3 E. D. Smith, 262; *Moses* v. *Bierling*, 31 N. Y. (4 Tiff.) 462; *Phelan* v. *Gardner*, 43 Cal. 306. So, after the consignment of property to a commission merchant, the consignor cannot deprive the consignee of all benefit of his commissions by selling the property himself. *Briggs* v. *Boyd*, 65 Barb. 199.

Where a broker is employed to effect a sale or mortgage of property the title to which is defective, and the negotiation fails, he is still entitled to his commission provided he has in good faith found a person ready and able to complete the contract if the title were clear. *Doty* v. *Garner*, 43 Barb. 529; *Knapp* v. *Wallace*, 41 N. Y. (2 Hand) 477; *Green* v. *Lucas*, 33 L. T. (N. S.) 586; *Hilly* v. *Gisling*, 3 E. D. Smith, 263. But see *Budd* v. *Zoller*, 52 Mo. 238; *Tombs* v. *Alexander*, 101 Mass. 255.

It has already been remarked (*ante*, p. 276), that a broker cannot become the purchaser of property intrusted to him for sale, and of course he can recover no commission for such sale. *Salomons* v. *Pender*, 34 L. J. (N. S.) 95; *Tower* v. *O'Neil*, 66 Penn. St. 332. Nor can he render such services for both buyer and seller at the same time as to entitle him to commissions from both, unless his double employment was known and assented to by both (*Rice* v. *Wood*, 113 Mass. 133; S. C., 18 Am. Rep. 459; *Pugsley* v. *Murray*, 4 E. D. Smith, 245; *Watkins* v. *Cousall*, 1 id. 65; *Spyer* v. *Fisher*, 37 Sup. Ct. R. [5 J. & S.] 93;

Rowe v. *Stevens*, 35 id. [J. & S.] 189); and evidence to show a custom among brokers to charge a commission to both parties in such cases is inadmissible. *Farnsworth* v. *Hemmer*, 1 Allen (Mass.), 494; *Walker* v. *Osgood*, 98 Mass. 348; *Rice* v. *Wood*, 113 id. 133; 18 Am. Rep. 459; *Raisin* v. *Clark*, 41 Md. 158; 20 Am. Rep. 66.

Negligence, want of skill, and improper conduct, on the part of the broker, will diminish the amount of his commissions or prevent any recovery at all. *Dodge* v. *Tileston*, 12 Pick. 328. Thus, where an agent failed to pay over the proceeds of a sale for an unreasonable length of time he was held to have forfeited his commissions. *Segar* v. *Parrish*, 20 Gratt. (Va) 672.

The amount of the broker's commissions, unless determined by agreement, are fixed by the custom at the time and place of employment (*Morgan* v. *Mason*, 4 E. D. Smith, 636); but evidence of custom cannot be resorted to to vary the terms of an express contract. *Bower* v. *Jones*, 8 Bing. 65; *Ware* v. *Hayward Rubber Co.*, 3 Allen (Mass.), 84.

§ 7. **Bill brokers.** Bill brokers propose and conclude bargains between merchants and others in matters of bills of exchange. They differ from other brokers in that they are ordinarily intrusted with the possession of the bills. The vendee in such case will be protected in a payment of the purchase-price to the broker (*Lentilhon* v. *Vorwerck*, Hill & D. Supp. 443), and they will also have a lien on the property in their hands for advances. *State* v. *Levy*, 1 McMull. (S. C.) 431.

Where a broker sells a note for cash, he will be liable to the purchaser for the purchase-money if the signatures turn out to be forged (*Merriam* v. *Wolcott*, 3 Allen [Mass.], 258; *Morrison* v. *Currie*, 4 Duer, 79; *Shaver* v. *Ehle*, 16 Johns. 201; *Aldrich* v. *Jackson*, 5 R. I. 218), unless he discloses the name of his principal (*Gurney* v. *Wormersley*, 4 El. & Bl. 132; *Canal Bank* v. *Bank of Albany*, 1 Hill [N. Y.], 287; *Bell* v. *Cafferty*, 21 Ind. 411; *Dumont* v. *Williamson*, 18 Ohio St. 515), in which case if he has paid the money over to his principal, he will not be liable. *Morrison* v. *Currie*, 4 Duer, 79, 85; *Canal Bank* v. *Bank of Albany*, 1 Hill, 287; *Thomson* v. *Davenport*, 9 Barn. & C. 78.

§ 8. **Insurance brokers.** Insurance brokers have by general usage a lien upon policies of insurance in their hands procured by them for their principals, and also upon the moneys received by them upon such policies (*McKenzie* v. *Nevius*, 22 Me. 138; Story on Agency, §§ 373, 376, 379; *Sharp* v. *Whipple*, 1 Bosw. 557; *Kruger* v. *Wilcox*, Ambler, 252; *Moody* v. *Webster*, 3 Pick. 424; *Man* v. *Shiffner*, 2 East, 523; *Mann* v. *Forrester*, 4 Camp. 60), this lien of the broker is ex-

tinguished when he parts with the possession of the policies by their delivery to the assured or his agent (*Sharp* v. *Whipple*, 1 Bosw. 557; *Spring* v. *South Carolina Ins. Co.*, 8 Wheat. 268); but when the policies come again into his possession the lien revives (*Sharp* v. *Whipple*, 1 Bosw. 557; *Spring* v. *South Carolina Ins Co.*, 8 Wheat. 268; *Kruger* v. *Wilcox*, Ambler, 252, 254); but before the lien can revive the policies must again come into the possession of the broker as the property of the same owner, when his right will revive or continue unaffected by intermediate equities. *Sharp* v. *Whipple*, 1 Bosw. 557; *Spring* v. *South Carolina Ins. Co.*, 8 Wheat. 268. A broker authorized to effect an insurance has authority also to adjust a loss arising under it (*Richardson* v. *Anderson*, 1 Camp. 43, note); and if he retains the policies in his possession, he is presumed to promise that he will collect the sums due from the underwriters, upon a loss happening, and he is bound to use all reasonable diligence in effecting a settlement of the loss. *Bousfield* v. *Creswell*, 2 Camp. 545. The agent who makes an insurance has authority to abandon without a formal letter of attorney. *Chesapeake Ins. Co.* v. *Stark*, 6 Cranch, 268. A broker, in procuring insurance, must exercise care in effecting the policy, otherwise he will be presumably liable. Thus, he must follow the usual custom in the manner in which the policy is drawn (*Mallough* v. *Barber*, 4 Camp. 150), as well as conform to the instructions of his principal (*Park* v. *Hamond*, 4 Camp. 345; 6 Taunt. 495), but where instructions are general and the agent acts in good faith, no liability will arise. *Moore* v. *Mourgue*, Cowp. 479.

An insurance broker may make the contract of insurance in his own name for the principal, or in the name of the principal, and it is not unusual for the broker to effect the policy for account of whom it may concern. The English rule permits the broker to sue on contracts of this nature made in his name (*Sargent* v. *Morris*, 3 Barn. & Ald. 277, 288; *Garrett* v. *Handley*, 4 Barn. & Cress. 664; *Gibson* v. *Winter*, 5 Barn. & Adol. 96), unless the insured party first elects to bring the action (*Rogers* v. *Traders' Ins. Co.*, 6 Paige's Ch. 583); but under the Code practice, such actions must be brought in the name of the real party in interest, or must appear to be brought by the plaintiff as trustee of an express trust. *Freeman* v. *Fulton Fire Ins. Co.*, 14 Abb. Pr. 398.

§ 9. **Real estate brokers.** Real estate brokers negotiate the sale or purchase of real estate. They sometimes procure loans on mortgage security, collect rents, and attend to the letting and leasing of houses and lands. Bouv. Dict., tit. *Brokers*. Their powers are ordinarily limited to negotiating a contract and do not extend to the execution of

a contract of purchase or sale, and in this respect they differ from merchandise brokers. See *Rowe* v. *Stevens*, 35 N. Y. Super. 189; *Hamer* v. *Sharp*, L. R., 19 Eq. 108; 11 Eng. Rep. 714; *Rutenberg* v. *Main*, 47 Cal. 213. The broker may be employed orally or by writing (*Fiero* v. *Fiero*, 52 Barb. 288); and he may be authorized to make a contract for the sale or lease of real estate which will be sufficient under the statute of frauds, by an instrument not under seal and even by parol (*Pringle* v. *Spaulding*, 53 Barb. 21; *Haydock* v. *Stow*, 40 N. Y. [1 Hand] 363; *Rutenberg* v. *Main*, 47 Cal. 213); but he may not attach a seal to the instrument made under such an authority. *Blood* v. *Goodrich*, 12 Wend. 525. An authority "to close the bargain," is not an authority to sign the name of the principal to a contract of a sale. *Glentworth* v. *Luther*, 21 Barb. 145.

The agency of a real estate agent and his duty to his principal ceases upon the delivery of the title papers and payment for the property. *Walker* v. *Derby*, 5 Biss. (C. C.) 134

Evidence that a lot of land in one year doubled in value has no tendency to prove that a broker was not authorized to sell, during the year, at the original price. *Wilkinson* v. *Churchill*, 114 Mass. 184.

One who has employed a broker to sell his real estate can himself sell; and if he does so to a purchaser procured without the aid of the broker, the latter is not entitled to his commissions. In order to earn his commissions the broker must be the procuring cause of the sale. Through his agency a customer must be procured, ready and willing to enter into a contract upon the employer's terms. *Tombs* v. *Alexander*, 101 Mass. 255; 3 Am. Rep. 349; *Lloyd* v. *Matthews*, 51 N. Y. (6 Sick.) 125; *Hungerford* v. *Hicks*, 39 Conn. 259. And where the broker opens negotiations, but failing to bring the customer to the specified terms abandons them, and the employer subsequently sells to the same person, at the price fixed, he is not liable to the broker for his commissions. *Wylie* v. *Marine National Bank*, 61 N. Y. (16 Sick.) 415. See *Chandler* v. *Sutton*, 5 Daly (N. Y.), 112; *Bennett* v. *Kidder*, 5 id. 512; *Dennis* v. *Charlick*, 6 Hun (N. Y.), 21; *Schwartze* v. *Yearly*, 31 Md. 270; *Vreeland* v. *Vetterlein*, 33 N. J. Law, 247; *Lane* v. *Albright*, 49 Ind. 275.

§ 10. **Stock brokers.** Stock brokers are employed to buy and sell stock in the public funds, or in the funds of joint-stock companies. M'Culloch's Com. Dic. *in loco;* Whart. on Agency, § 902. According to the custom among brokers, the brokers only and not the principals are known in their dealings with each other, and the title to securities dealt in is taken in the broker's name. Such a custom is not unreasonable. *Horton* v. *Morgan*, 19 N. Y. (5 Smith) 170. Parties deal-

ing with brokers are presumed to deal in reference to the custom of brokers, and this is so even though the custom is unknown to them (*Horton* v. *Morgan*, 19 N. Y. [5 Smith] 170; *Whitehouse* v. *Moore*, 13 Abb. Pr. 142; *Rosenstock* v. *Tormey*, 32 Md. 169; 3 Am. Rep. 125; *Pollock* v. *Stables*, 12 Q. B. 765); but this is subject to the provisions in reference to usage hereinbefore stated. See *ante*, p. 275.

When a broker agrees for a commission to be paid to him, and upon the deposit with him of the margin agreed on, to make a sale of stock for a customer, it is part of the bargain that the broker shall carry the stock for a reasonable time, for in no other way can the object of the parties be effectuated. *White* v. *Smith*, 54 N. Y. (9 Sick) 522. The broker can, however, at any time close the transaction if the margin upon his demand is not kept good. Id.; *Rosenstock* v. *Tormey*, 32 Md. 169; 3 Am. Rep. 125; *Durant* v. *Burt*, 98 Mass. 161. He has not the right, unless it is specially conferred upon him, to buy in stock to cover a sale, or to sell stock to cover advances, without demand and notice. *Ritter* v *Cushman*, 7 Robt. (N. Y.) 294, 298; *Brass* v. *Worth*, 44 Barb. 648; *White* v. *Smith*, 54 N. Y. (9 Sick.) 522; *Markham* v. *Jaudon*, 41 N. Y. (2 Hand) 235. But a formal demand and notice may be waived by the declaration of the principal. *Cameron* v. *Durheim*, 55 N. Y. (10 Sick.) 425; *Ritter* v. *Cushman*, 7 Robt. (N. Y.) 294; *Baker* v. *Drake*, 66 N. Y. (21 Sick.) 518.

And when after proper notice and sale, the proceeds of the securities do not reimburse the broker, the principal will be liable for the difference as money laid out and expended at his request and for his use. *Schepeler* v. *Eisner*, 3 Daly (N. Y.), 11; *Wheeler* v. *Newbould*, 16 N. Y. (2 Smith) 392; *Willoughby* v. *Comstock*, 3 Hill, 389. See *Stewart* v. *Drake*, 46 N. Y. (1 Sick.) 449.

Where a broker, holding stocks on a margin, continues to hold them for an unreasonable length of time after the bankruptcy of his principal, and then sells them without notice, he must sustain the loss, if any there be. *Re Daniels*, 13 Bankr. Reg. 46.

A customer employing stockholders to purchase, carry, and sell stocks on his account, cannot dispute, as too high, the rates of commissions charged against him for raising money to carry his stocks in a stringent money market, where he is informed of their custom in that respect at the beginning of their dealings, and is kept informed at short intervals of the daily state of his accounts with them, and makes no objection thereto until a settlement is demanded. *Robinson* v. *Norris*, 51 How. 442.

Where a broker purchases stock for his principal upon a margin, he is bound to keep, at all times, on hand or under his control, either the

particular shares purchased for his customer, or an equal amount of other shares of the same kind, and to have them in such a situation that the customer, on paying the amount due by him thereon, can at any time obtain them. *Taussig* v. *Hart*, 58 N. Y. (13 Sick.) 425, 429; *Horton* v. *Morgan*, 19 N. Y. (5 Smith) 170. See *Parsons* v. *Martin*, 11 Gray (Mass.), 111.

Under an agreement to buy and carry stock the engagement is not to procure and furnish stock when required, but to purchase and hold the number of shares ordered subject to the payment of the purchase-price. *Taussig* v. *Hart*, 58 N. Y. (13 Sick.) 425.

When the broker sells, but fails to keep enough stock on hand to cover purchases made for his principal, the customer can ratify and claim the benefit of the sale, or he can claim the value of the stock on the day of sale. Id. See *Clark* v. *Meigs*, 13 Abb. Pr. 467.

TITLE II.

FACTORS AND COMMISSION MERCHANTS.

ARTICLE I.

OF FACTORS AND COMMISSION MERCHANTS IN GENERAL.

Section 1. Definition and nature. A factor is an agent employed to sell goods consigned or delivered to him by or for his principal for a commission usually called a factorage or commission. Bouv. Dict. *in loco.* Hence he is often called a commission merchant or consignee; the goods received by him for sale are called a consignment. Story on Agency, § 38. There seems to be no substantial difference in law between a factor and a commission merchant. Id., note 4. The words are ordinarily used interchangeably. A factor, as we have seen, differs materially from a broker. He is intrusted with the possession, management and disposal of the consigned property. He may sell in his own name and may receive and enforce payment. *Baring* v. *Corrie*, 2 B. & Ald. 148; *Higgins* v. *Moore*, 34 N. Y. (7 Tiff.) 418, 419; *Ladd* v. *Arkell*, 37 N. Y. Super. (5 J. & S.) 35; *Graham* v. *Duckwall*, 8 Bush (Ky.), 12. He ordinarily makes advances to his principal and thus acquires a lien upon, and a special property in, the consignment. See *ante*, 274, *Broker*, § 1.

§ 2. **Del credere factors.** A *del credere* factor is distinguished from other factors in this, that he guarantees that those persons to whom he sells shall perform the contracts that he makes with them. *Ex parte White, in re Nevill*, L. R., 6 Ch. App. 397, 403. The responsi-

bility of a *del credere* commission can be assumed by parol. It is not regarded as such an agreement to answer for the debt, default or miscarriage of another as to be within the operation of the statute of frauds. *Wolff* v. *Koppel*, 5 Hill, 458; S. C. on appeal, 2 Denio, 368; *Sherwood* v. *Stone*, 14 N. Y. (4 Kern.) 267; *Cartwright* v. *Greene*, 47 Barb. 9; *Bradley* v. *Richardson*, 23 Vt. 720; *Gould* v. *Lee*, 55 Penn. St. 99; *Lewis* v. *Brehme*, 33 Md. 412; 3 Am. Rep. 190. And this is the English doctrine (*Couturier* v. *Hastie*, 5 H. L. Cas. 673; 2 Jur. [N. S.] 1241; 25 L. J. Exch. 253; *Wickham* v. *Wickham*, 2 Kay & J. 478); although a different view was at one time supposed to prevail. See *Sherwood* v. *Stone*, 14 N. Y. (4 Kern.) 267, 269; Mitchell, J. — *Morris* v. *Cleasby*, 4 M. & S. 566; *Peele* v. *Northcote*, 7 Taunt. 478. But though the contract of a *del credere* commission is not in this sense a collateral contract, neither is it such a contract as to render the factor a principal debtor. *Ex parte White, in re Nevill*, L. R., 6 Ch. App. 397.

It is sometimes difficult to determine whether the relation established is that of principal and agent, or that of purchaser and vendor. The test is to ascertain whether the alleged agent has undertaken that the person to whom he sells shall pay or whether he himself undertakes to pay a certain fixed price for the goods. *Ex parte White, in re Nevill*, L. R., 6 Ch. App. 396, 403.

He may guarantee that the goods will bring a certain price, and in that event he is not entitled to make any charge, either by way of commission or otherwise, that will reduce the proceeds below that amount. *Dalton* v. *Goddard*, 104 Mass. 497. Though he guarantees a sale on credit the principal cannot maintain an action against him for the proceeds until the credit has expired (*Bradley* v. *Richardson*, 23 Vt. 720); but when by default of the purchaser he has become liable to pay the price to the principal, he is chargeable with interest without demand. *Blakely* v. *Jacobson*, 9 Bosw. 140. The contract implied by a factor acting under a *del credere* commission does not make him a guarantor of the remittance (*Leverick* v. *Meigs*, 1 Cow. 645; *Heubach* v. *Mollman*, 2 Duer, 227; *Cartwright* v. *Greene*, 47 Barb. 9, 17); but where he receives a commission for making the remittance as part of the original *del credere* undertaking, the remittance will be at his own risk. *Heubach* v. *Mollman*, 2 Duer, 227, 253.

§ 3. **Factor's general powers and duties.** The owner has the right to control the sale of his property; to prescribe the price, time and conditions of the sale, subject only to the factor's lien. Ed. on Fact., § 22. How far the principal can control the factor who has made advances will be considered hereafter. See *ante*, 280. Ordinarily, therefore, the factor is bound to obey the instructions of his principal.

Scott v. *Rogers*, 31 N. Y. (4 Tiff.) 676; *Milbank* v. *Dennistoun*, 21 N. Y. (7 Smith) 386; *Bessent* v. *Harris*, 63 N. C. 542; *Phillips* v. *Scott*, 43 Mo. 86; *Gray* v. *Bass*, 42 Ga. 270; *Bigelow* v. *Walker*, 24 Vt. 149. In the absence of express instructions he will be authorized to follow the usage of others in the same market in the same line of business. *Dwight* v. *Whitney*, 15 Pick. 179; *Owings* v. *Hull*, 9 Pet. 607. See *ante*, *Brokers*. But usage will not relieve the factor of an obligation which the law imposes, unless he shows that his principal had knowledge of such usage, or that he assented to that manner of doing his business. *Farmers & Mech. Nat. Bank* v. *Sprague*, 52 N. Y. (7 Sick.) 608; *Duguid* v. *Edwards*, 50 Barb. 288. Where a warranty is usual he may sell with warranty. *Schuchardt* v. *Allens*, 1 Wall. 359; *Randall* v. *Kehlor*, 60 Me. 37; 11 Am. Rep. 169; *Smith* v. *Tracy*, 36 N. Y. (9 Tiff.) 79; *Palmer* v. *Hatch*, 46 Mo. 585. So the factor may sell on credit where the usage of the market in which he sells permits him to sell on credit. *Goodenow* v. *Tyler*, 7 Mass. 36; *Forrestier* v. *Bordman*, 1 Story, 43.

But the factor must use due diligence to ascertain the solvency of the purchasers. *Van Alen* v. *Vanderpool*, 6 Johns. 69; *De Lazardi* v. *Hewitt*, 7 B. Monr. (Ky.) 697; *Clark* v. *Van Northwick*, 1 Pick. (Mass.) 343. The court will take notice as a part of the law merchant that a factor may sell goods at a reasonable credit at the risk of his principal, when he is not restrained by his instructions nor by the usage of trade. Parsons, C. J., in *Goodenow* v. *Tyler*, 7 Mass. 36; S. C., 1 Am. Lead. Cas. 788, 794, and note; *Dwight* v. *Whitney*, 15 Pick. 179; *Hapgood* v. *Batcheller*, 4 Metc. 573.

And the factor may take notes for the purchase-price, in his own name, without becoming personally liable to the principal, if the buyer was in good credit at the time of sale. *West Boylston Manuf. Co.* v. *Searle*, 15 Pick. 225; *Chandler* v. *Hogle*, 58 Ill. 46; *Goodenow* v. *Tyler*, 7 Mass. 36; S. C., 1 Am. Lead. Cas. 788, *n*; *Goldthwaite* v. *M' Whorter*, 5 Stew. & Port. 284.

Whatever notes or securities the factor takes, whether in his own name or otherwise, are in trust for the principal and are subject to the principal's orders (*Goodenow* v. *Tyler*, 7 Mass. 36; S. C., 1 Am. Lead. Cas. 788; *Gorman* v. *Wheeler*, 10 Gray, 362); and can be enforced by the principal. *Edmond* v. *Caldwell*, 15 Me. 340.

The factor has no power to extend the credit given to the purchaser (*Douglass* v. *Bernard*, Anth. N. P. 278; *Myers* v. *Entirkin*, 6 W. & S. 44); although he may alter the form of the security if it does not utterly release the debtor or extend the credit. *Corlies* v. *Cumming*, 6 Cow. 181, 185.

A factor cannot dispose of the goods of his principal by way of barter. *Potter* v. *Dennison*, 10 Ill. 590. If he does, the principal may maintain trover for the goods against the party with whom they were bartered. *Guerriero* v. *Peile*, 3 B. & Ald. 616.

To what extent the factor may pledge the goods of his principal will be considered hereafter. See *post*, 299.

The general principle is that a factor cannot bind his principal by a disposition of the property in any other way than by sale in the usual course of trade. So, where a factor sold the goods of his principal in consideration, in part, of an antecedent debt of the factor to the purchaser, and in part, for cash which the purchaser knew was to be applied to the payment of the factor's own indebtedness, it was held that the sale was wholly unauthorized and void as against the principal. *Easton* v. *Clark*, 35 N. Y. (8 Tiff.) 225.

Where no express limit of time within which the factor is to sell is made, he must sell within a reasonable time, otherwise the interests of his principal might be injuriously affected and there would be no termination of his liability. *Porter* v. *Blood*, 5 Pick. 54.

A factor has an insurable interest in the goods, but he is not bound to insure unless so instructed by his principal (*Schafer* v. *Kirk*, 49 Ill. 251; *Ætna Ins. Co.* v. *Jackson*, 16 B. Monr. [Ky.] 242); and when so instructed, if he have funds of the principal in his hands he will be liable if he fails to comply. *Smith* v. *Lascelles*, 2 Term R. 189; *Crosbie* v. *McDoual*, 13 Ves. 148, 158; Ed. on Factors, § 32. When instructed to purchase for his principal he is not bound to act until the purchase-money has been remitted to him. *Rice* v. *Montgomery*, 4 Biss. (C. C.) 75.

A factor cannot make a valid sale of property intrusted to him for sale, to himself, or to a partnership of which he is a member. *Martin* v. *Moulton*, 8 N. H. 504; *Charter* v. *Trevellyan*, 11 Cl. & Fin. 714; *Bunker* v. *Miles*, 30 Me. 431; *White* v. *Ward*, 26 Ark. 445. Being invested with a discretion he cannot act as the agent of both parties in making the contract. *N. Y. Cent. Ins. Co.* v. *N. P. Ins. Co.*, 14 N. Y. (4 Kern.) 85; *Conkey* v. *Bond*, 36 N. Y. (9 Tiff.) 427; S. C., 34 Barb. 276; *Claflin* v. *Farmers, etc., Bank*, 24 How. Pr. 1, 14. See *Greenwood* v. *Spring*, 54 Barb. 375; see *ante*, *Brokers*.

A factor is bound to assume that his principal is the owner of the goods consigned to him for sale, and his allegiance is alone due to his principal. *Barnard* v. *Kobbe*, 54 N. Y. (9 Sick.) 516; *Roberts* v. *Ogilby*, 9 Price, 269; *Kiernan* v. *Sandars*, 6 Ad. & Ell. 515; *Marvin* v. *Ellwood*, 11 Paige, 365. He is not protected in paying over the pro-

ceeds on an attachment against a third person. *Barnard* v. *Kobbe*, 54 N. Y. (9 Sick.) 516.

§ 4. **Duty to remit and account.** It is the duty of a factor who has funds of his principal to give early information of the fact, and to retain them subject to the order of the principal, unless he has been previously directed or authorized to remit. If he undertakes to remit when no direction or authority has been given, the remittance is at his own risk. Vol. 1, 245, 253. When he has been directed or has a discretionary power to remit, he acts in purchasing a bill for that purpose simply as the agent of his correspondent, and is then responsible only for good faith and due diligence. Id.; DUER, J.—*Heubach* v. *Mollman*, 2 Duer, 227, 252; *Eaton* v. *Welton*, 32 N. H. 352; *Clark* v. *Moody*, 17 Mass. 144; *Lyle* v. *Murray*, 4 Sandf. 590. He may, in the absence of express instructions, remit in accordance with the usage. *Potter* v. *Morland*, 3 Cush. 384; *Chandler* v. *Hogle*, 58 Ill. 46. When instructed to "forward," he was held to have discharged his duty by sending by mail. Vol. 1, 245, 253; *Buell* v. *Chapin*, 99 Mass. 594. But see *Burr* v. *Sickles*, 17 Ark. 428. A factor who indorses a bill for remittance does not thereby become liable as guarantor, if he receives no consideration for guaranteeing, and does not expressly undertake to do so. *Sharp* v. *Emmet*, 5 Whart. (Penn.) 288.

But while a factor is not bound to remit until he has received instructions, and therefore is not liable to an action until he has thus been instructed (Vol. 1, 252–254; *Cooley* v. *Betts*, 24 Wend. 203; *Halden* v. *Crafts*, 4 E. D. Smith, 490; *Brink* v. *Dolsen*, 8 Barb. 337), he is nevertheless bound to account to his principal for the proceeds of goods within a reasonable time without instructions (*Clark* v. *Moody*, 17 Mass. 145; S. C., 1 Am. Lead. Cas. 836, 850; Vol. 1, 252–254); and in cases where a demand would be impracticable or extremely inconvenient, it seems that a factor would be liable to an action without demand. *Eaton* v. *Welton*, 32 N. H. 352.

§ 5. **Factor's rights as to third persons.** The rights of factors against third persons may be properly divided into two classes: first, his right to sue third persons on contracts into which the latter may have entered with him as agent (Vol. 1, 278–280); and secondly, his right to sue third persons for wrongs of which the latter may have been guilty toward him in the cause of his agency. Id. 280; Russell on Merc. Agents, 193.

When the factor has acquired a special property in the consigned goods by making advances thereon, or otherwise, he will have the same right to enforce payments which agents generally have (see *ante*, title *Agency*, Vol. 1, p. 278); but when he has acquired a lien, either in respect of

the particular goods or for his general balance, he may sue the vendee in his own name. *Sadler* v. *Leigh*, 4 Camp 195, *Toland* v *Murray*, 18 Johns. 24; *White* v. *Chouteau* 10 Barb. 202; *Ladd* v *Arkell*, 39 N Y. Super. (5 J. & S.) 34; *Girard* v. *Taggart*, 5 Serg. & R. 27; *Graham* v. *Duckwall*, 8 Bush (Ky.), 12. Under the Code, a factor who contracts in his own name on behalf of his principal is a trustee of an express trust, and is the proper party to bring an action. *Grinnell* v. *Schmidt*, 2 Sandf. 710; *Rowland* v. *Phalen*, 1 Bosw. 43; *Considerant* v. *Brisbane*, 22 N. Y. (8 Smith) 389; *Ladd* v. *Arkell*, 39 N. Y. Super. (5 J. & S.) 35. The general rule that an undisclosed principal may adopt the contract of his agent as his own, and enforce it in his own name, is limited in the case under consideration by the rule that the principal cannot, after notice, either by enforcing or accepting payment, defeat the right of the factor to the extent of his lien. Vol. 1, 281; *Drinkwater* v. *Goodwin*, Cowp. 251; *Atkyns* v. *Amber*, 2 Esp. 493; *Coppin* v. *Walker*, 7 Taunt. 237. See *Miller* v. *Lea*, 35 Md. 396; 6 Am. Rep. 417. So, the factor may sue for trespass and torts committed on the goods while in his possession. *Short* v. *Spackman*, 2 Barn. & Ad. 962; *Fowler* v. *Down*, 1 Bos. & Pul. 47; Russell on Merc. Agents, 203; 2 Kent's Com. 632. Thus, he may maintain an action for the conversion of the consigned property. *Gorum* v. *Carey*, 1 Abb. Pr. 285; *Winne* v. *Hammond*, 37 Ill. 99. And where he has a transfer of the bills of lading upon advances made by him this is sufficient possession to enable him to maintain replevin for the goods. *Dows* v. *Rush*, 28 Barb. 157.

§ 6. **Factors' liabilties to third persons.** The general rule is well settled that an agent who discloses his principal, and so contracts as to give a remedy against the principal, is not liable personally unless it was clearly his intention to assume a personal liability. See *ante*, title *Agency*, Vol. 1, p. 256. But when money has been paid under such circumstances that it might be recovered back from the principal, then it may be recovered from the agent, provided he has not altered his situation in relation to him, for instance, by giving fresh credit. *La Fargo* v. *Kneeland*, 7 Cow. 456, 460.

Where a factor deals in his own name without disclosing his agency, he becomes personally liable on his contract, though the principal, when discovered, may also be liable. *Thomson* v. *Davenport*, 2 Smith's Lead. Cas. 358, 366; *Addison* v. *Gandasequi*, id. 348; *Fowler* v. *Hollins*, L. R., 7 Q. B. 616; *McGraw* v. *Godfrey*, 14 Abb. (N. S.) 397; 16 id. 358 (11 Sick.) 610.

A factor who acts for a foreign principal is regarded in England as *prima facie* liable upon contracts made by him. Vol. 1, 259; *Thom-*

son v. *Davenport*, 9 B. & C. 78, 86; TENTERDEN, C. J.—S. C., 2 Smith's Lead. Cas. ; Russell on Merc. Agency, 233; Story on Agency, § 400; *Hutton* v. *Bulloch*, L. R., 8 Q. B. 331; 3 Eng. Rep. 89. This doctrine is said to be in conformity with the general usage of trade. Story on Agency, § 400. The foreign residence of the principal is at all events a strong circumstance tending to show that the credit was given to the agent, and in some cases has been said to be conclusive. *Rogers* v. *March*, 33 Me. 106; *McKenzie* v. *Nevius*, 9 Shepley, 138. See dissenting opinion of WALWORTH, Chan. — *Kirkpatrick* v. *Stainer*, 22 Wend. 244. The conclusion, however, is one of fact and not of law (*Oelricks* v. *Ford*, 23 How. [U. S.] 49; *Green* v. *Kopke*, 18 C. B. 549); and if the intention to hold the foreign principal appears, he will be liable. *Trueman* v. *Loder*, 11 Ad. & Ell. 589. But the States of the Union are not considered as foreign to each other in the application of the principles here stated. *Vawter* v. *Baker*, 23 Ind. 63; *Barry* v. *Page*, 10 Gray, 398; *Taintor* v. *Prendergrast*, 3 Hill, 72.

§ 7. **Factors' liability to employer.** The duties of factors have been already considered. A failure to perform any duty toward the principal imposed by law will create a liability on the part of the factor. These liabilities may be conveniently considered in general classes.

Thus, a factor must possess the requisite skill and knowledge, and exercise the proper diligence in his business, otherwise he will be guilty of *negligence*. The degree of diligence required of a factor has been well stated by Dr. Wharton. He says: "The true test is the diligence which good business men of the particular class are accustomed to apply." Wharton on Agency, § 779; Vol. 1, 241, 242. See *Adams* v. *Capron*, 21 Md. 186; *Phillips* v. *Moir*, 69 Ill. 155; *Milbank* v. *Dennistoun*, 21 N. Y. (7 Smith) 386; *McCants* v. *Wells*, 3 So. Car. 569. Thus, when a factor sells on credit, he is bound to exercise diligence in ascertaining the business standing of the purchaser (see *ante*, Vol. 1, 223; *Burrill* v. *Phillips*, 1 Gall. 360; 1 Am. Lead. Cas. 826, 841); and where the factor undertook to sell only for good paper, and sold for paper he knew to be worthless, he was held responsible as guarantor. *Clark* v. *Roberts*, 26 Mich. 506. And see *Foster* v. *Waller*, 75 Ill. 464.

Where property consigned to a foreign factor was seized for a breach of the revenue laws of that country, it was held that the factor must account for the property unless he could show that he had conformed to the laws of the country, or was authorized to act as he did, or that he could not act in any other manner than he did, and that this was a

fact known to the principal when he made the consignment. *Wellman* v. *Nutting*, 3 Mass. 433.

So the factor is bound to sell for the best price. *Merle* v. *Hascall*, 10 Mo. 406. But it is at least questionable how far he will be liable for not forecasting the future. *Ward* v. *Bledsoe*, 32 Tex. 251.

Where goods are sent to a factor to use what he needs and sell the remainder, if he uses them all an action lies against him for goods sold and delivered. *Wadsworth* v. *Gay*, 118 Mass. 44.

So, as we have seen, a factor is bound to obey the *instructions* of his principal. *Ante*, Vol. 1, 242; *Courcier* v. *Ritter*, 4 Wash. 549; S. C., Am. Lead. Cas. 828; *Jervis* v. *Hoyt*, 2 Hun (N. Y.), 637. Where goods are consigned to a factor for sale with specific instructions as to the price, he has no right to sell below the price named to cover his advances without calling on his principal for repayment. *Blot* v. *Boiceau*, 3 N. Y. 78; *Frothingham* v. *Everton*, 12 N. H. 239, 242

But where a consignment has been made generally without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, the right of the principal by subsequent orders to control the sale has been the subject of conflicting opinions. The supreme court of the United States has held that in such cases the principal cannot by subsequent orders control the factor's right to sell at such a time as in the exercise of a sound discretion, and in accordance with the usage of trade, he may deem best to secure indemnity to himself and to promote the interests of the consignor. *Brown* v. *McGraw*, 14 Pet. 479; *Field* v. *Farrington*, 10 Wall. 141. A contrary rule has, however, been adopted by other courts. *Marfield* v. *Goodhue*, 3 N. Y. (3 Comst.) 62; *Bell* v. *Palmer*, 6 Cow. 128; *Hidden* v. *Waldo*, 55 N. Y. (10 Sick.) 294; *Wicks* v. *Hatch*, 62 N. Y. (17 Sick.) 535.

With the exception here stated the settled rule is that a factor will be liable if he deviates materially from the instructions of his principal. *Scott* v. *Rogers*, 31 N. Y. (4 Tiff.) 676; *Wilson* v. *Wilson*, 26 Penn. St. 394; *Scott* v. *Rogers*, 4 Abb. Ct. App. 157; *Courcier* v. *Ritter*, 4 Wash. C. C. 549; S. C., 1 Smith's Lead. Cas. 828. See *ante*, Vol. 1, 242.

The factor, however, is entitled to the benefit of any doubt arising from the terms of his instructions. Vol. 1, 242; *Le Roy* v. *Beard*, 8 How. (U. S.) 451, 466; *Very* v. *Levy*, 13 id. 345, 358. And the mere expression of a wish or hope will not be sufficient unless the expression is clearly intended as an instruction. *Vianna* v. *Barclay*, 3 Cow. 281; *De Tastett* v. *Crousillat*, 2 Wash. C. C. 132, 137; *Kingston* v. *Kincaid*, 1 id. 454, 457; *La Farge* v. *Kneeland*, 7 Cow. 456.

But if he disobey his instructions and render accounts to his principal, showing the actual transaction, to which no objection is taken by the principal, this will amount to a modification of the original instructions and a ratification of the factor's act. *Marshall* v. *Williams*, 2 Biss. 255; *Woodward* v. *Suydam*, 11 Ohio, 360; Story on Agency, § 252.

As we have heretofore seen, as a general rule a factor is bound to pay only upon demand, or instructions to remit. *Burns* v. *Pillsbury*, 17 N. H. 66; *Halden* v. *Crafts*, 4 E. D. Smith, 490; *Brink* v. *Dolsen*, 8 Barb. 337; *Cooley* v. *Betts*, 24 Wend. 203. Yet, where the principal has had notice of the sale, but has made no demand, he cannot shelter himself behind the absence of a demand to escape the effect of the statute of limitations. *Lyle* v. *Murray*, 4 Sandf. (N. Y.) 590. Where a factor sells contrary to instructions, the measure of damages is the actual damage sustained, and consequently, where there is no subsequent increase in the market value of the commodity, there is no damage. *Hinde* v. *Smith*, 6 Lans. (N. Y.) 464. See *Switzer* v. *Connett*, 11 Mo. 88. And in an action for a failure to sell when instructed, the damage would be the value of the goods at the time of the proposed sale. *Whelan* v. *Lynch*, 65 Barb. 327; 60 N. Y. (15 Sick.) 469; 19 Am. Rep. 202.

§ 8. **Empolyer's liabiity to factor.** The employer becomes liable to the factor, upon the performance of the service, for the commission stipulated, or established by the custom of trade. The subject of commissions will be treated hereafter separately. See *post*. The employer will also become liable to the factor for advances made by him, and for expenses incurred in the custody and control of the property. He will unquestionably be so liable when the goods, upon which the advances were made, do not realize enough to cover such advances and expenses. *Rice* v. *Isham*, 4 Abb. Ct. App. 37; 1 Keyes, 44; *Burrill* v. *Phillips*, 1 Gall. 360; S. C., 1 Am. Lead. Cas. Advances are considered by the general law as made upon the joint credit of the fund and the person of the principal (*Burrill* v. *Phillips*, 1 Gall. 360); but the principal does not become liable until the goods have been sold, and the proceeds applied to the indebtedness, for the goods are the primary fund for the payment of the advances, and the factor cannot resort to the principal until that is exhausted. *Gihon* v. *Stanton*, 9 N. Y. (5 Seld.) 476; *Mottram* v. *Mills*, 2 Sandf. (N. Y.) 189. But in *Mobile and Ohio R. R. Co.* v. *Whitney*, 39 Ala. 468, it was held that though the factor had goods in possession he might maintain an action of debt against the principal for expense of storage incurred by him. So, in *Upham* v. *Lefavour*, 11 Metc. (Mass.) 174, it was held, that a factor

who makes advances on goods consigned to him may maintain an action before the goods are sold to recover the money advanced, unless there is an agreement to the contrary.

The payment of a balance of an account by a factor to his principal, to close the account, is an assumption by the factor of the outstanding debts, and, if these remain uncollected, the factor cannot recover against the principal. *Oakley* v. *Crenshaw*, 4 Cow. 250; *Robertson* v. *Livingston*, 5 id. 473.

§ 9. **Validity of sale by factor.** Where the principal intrusts the factor with the possession of the property, or the muniments of title, with authority to sell, though the authority be limited by conditions as to the manner or price, a purchaser has no means of ascertaining the limitations imposed upon the agent's power, and if without such information he buy of the factor for value and in good faith, he will acquire a good title as against the owner, and his right to the property will be protected. *Merwin* v. *Hamilton*, 6 Duer (N. Y.), 244; *Odiorne* v. *Maxcy*, 13 Mass. 178; S. C., 1 Am. Lead. Cas. 664, 682; *Arnold* v. *Halenbake*, 5 Wend. 33; Story on Agency, § 131; *Daniel* v. *Adams*, Ambler 495, 498.

And where the principal has been in the habit of employing a particular factor, he will be bound by contracts made by him on his behalf, within the scope of that employment, although made without instructions, or even after his agency has been determined, unless the persons who deal with the factor have notice of these circumstances. *Trueman* v. *Loder*, 11 Ad. & Ell. 589, 592; *Todd* v. *Robinson*, R. & M. 218; *Taylor* v. *Nussbaum*, 2 Duer, 302, 309; *Anderson* v. *Coonley*, 21 Wend. 279. But when the person with whom the factor deals has notice of the limitation on his authority, the factor, as any other agent, cannot bind his principal by a negotiation in contravention of those limitations. *Howard* v. *Braithwaite*, 1 Ves. & B. 202, 209; *Pitts* v. *Beckett*, 13 M. & W. 743. Nor can a factor bind his principal by an act which is beyond the scope of the general authority of agents of his class. Russell on Merc. Agents, 72; *Baring* v. *Corrie*, 2 B. & Ald. 137, 144; *Guerreiro* v. *Peile*, 3 id. 616; *Newson* v. *Thorton*, 6 East, 17.

§ 10. **Set-off by third persons.** If a factor sell goods in his own name, the purchaser, without a knowledge of any other person being a party to the contract, and in the absence of collusion, is entitled to regard the debt as due the factor, so as, in an action brought by the principal, to set off a debt due from the factor to himself. *Rabone* v. *Williams*, 7 Term R. 360, note *a*; *George* v. *Clagett*, 2 Smith's Lead. Cas. 185; *Hogan* v. *Shorb*, 24 Wend. 458; *Ruiz* v. *Norton*, 4 Cal. 355; *Van*

Lien v. *Byrnes*, 1 Hilt. (N. Y.) 133; *Oulds* v. *Harrison*, 10 Exch. 572, 580.

But where the purchaser knows, or has good reason to believe, that the vendor is acting as agent for some other person, in making the sale, he will not be entitled to the benefit of a set-off of his demand against the agent, and very general notice is sufficient to deprive the purchaser of a set-off against the agent. *Judson* v. *Stilwell*, 26 How. 513; *Bliss* v. *Bliss*, 7 Bosw. (N. Y.) 339; *Henry* v. *Marvin*, 3 E. D. Smith (N. Y.), 71; *Dortic* v. *Jeffers*, 10 Rich. (S. C.) 83; *Gordon* v. *Ellis*, 2 C. B. 821; *Semenza* v. *Brinsley*, 18 C. B. (N. S.) 469.

And where a factor intrusts goods of his principal to an agent for sale, such agent, knowing that the goods were intrusted to the former as factor, cannot, in an action against him by the factor to recover the proceeds of the goods which had been sold by him, set off a counterclaim on individual indebtedness due from the factor to him. *Ladd* v. *Arkell*, 8 Jones & Sp. (N. Y.) 150. See 5 id. 35.

§ 11. **Rights of third persons as to employer.** The rights which third persons will acquire against the principal, by virtue of contracts made, or acts done, by his agent are stated under a previous title. See title *Agency*, *ante*, Vol. 1, 285. It has already been observed, that while a factor acts within the scope of his authority, he will give the person with whom he deals, every right against the employer which the purchaser would himself have, were he acting directly with the principal. He may bind the principal by representations which he makes in the course of the negotiation. *Hunter* v. *H. R. I. & M. Co.*, 20 Barb. 493.

And so where the agent is guilty of fraud in making representations which inure to the benefit of the principal, and the principal accepts the fruit of such fraudulent representations, he will be responsible therefor. *Bennett* v. *Judson*, 21 N. Y. (7 Smith) 238; *Elwell* v. *Chamberlain*, 31 N. Y. (4 Tiff.) 611, 619.

§ 12. **Factors' power to pledge.** At common law a factor for sale has no authority to pledge the property of his principal for his own debt (*Bowie* v. *Napier*, 1 McCord [S. C.], 1; *Skinner* v. *Dodge*, 4 Hen. & M. [Va.] 432; *Kennedy* v. *Strong*, 14 Johns. 128; *Laussatt* v. *Lippincott*, 6 Serg. & R. 386; 1 Am. Lead. Cas. 805. *Contra*: *Hore* v. *Barker*, 11 Cal. 393); and such a disposition of the property is void. *Nowell* v. *Pratt*, 5 Cush. 111; *Kinder* v. *Shaw*, 2 Mass. 397.

Nor, unless expressly authorized, can he pledge the consigned property even to secure money for the use of the principal. *Bonito* v. *Mosquera*, 2 Bosw. (N. Y.) 401; *Hutton* v. *Bulloch*, L. R., 9 Q. B. 572; S. C., 10 Eng. R. 184; *Mackey* v. *Dillinger*, 73 Penn. St. 85; *Holton* v. *Smith*, 7 N. H. 449, and cases cited; *Michigan State Bank*

v. *Gardner*, 15 Gray, 362. But it has been held that he may *bona fide* pledge the property of his principal to the amount of his lien (Story on Agency, § 113; Wharton on Agency, § 754; *Urquhart* v. *McIver*, 4 Johns. 103; *McCombie* v. *Davies*, 7 East, 5); but even this right has been denied. *Walther* v. *Wetmore*, 1 E. D. Smith (N. Y.), 7. See Vol. 1, 273.

But these rules of the common law have been altered by statute in England and in most, if not all, of the States of the Union in this country. The English statutes upon the subject are 4 Geo. IV, ch. 82; 6 Geo. IV, ch. 94, and 5 and 6 Vict., ch. 39. The result of these statutes is that a factor who is intrusted with the possession either of goods or of the documents of title to goods may now deposit the same by way of pledge, lien, or security, for advances (Russell on Merc. Agents, 117); and he may do so even when the pawnee knows that he is dealing with a factor (Id. But see *infra*), unless he knows that the factor had no authority to pledge, or that he was not acting in good faith. The American legislation on this subject is founded on the English act of 6 Geo. IV, ch. 94. It is no part of the plan of this work to refer to these various enactments.

The New York factors' act (Laws of 1830, ch. 179; 2 Rev. Stat., 6th ed., p. 1168) has thus been summarized. "In brief, the effect of the statute seems to be, that he who has such documentary evidence of title, as gives him the exclusive control of the possession, shall be held the true owner of the property for certain purposes, provided the true owner has intrusted him with such evidence for the purpose of disposing of the property. A factor so situated can sell, or pledge the whole or any part of the property, or give upon it any lien or security for advances, or, in short, treat it as his own. Intrusted with the disposing control, he can exercise that control; and if he misappropriates the property or its avails, his principal must suffer, not the person who has dealt with the factor 'on the faith' of the position in which the principal has placed him." Gould, J., in *Cartwright* v. *Wilmerding*, 23 N. Y. (9 Smith) 521, 530. But this act does not protect a party who has made advances on goods to a factor with knowledge that he was not the true owner of the goods. *Stevens* v. *Wilson*, 3 Denio, 472; affirming S. C., 6 Hill, 512; *Covell* v. *Hill*, 6 N. Y. (2 Seld.) 374; *Wilson* v. *Nason*, 4 Bosw. (N. Y.) 155; *Bonito* v. *Mosquera*, 2 id. 401. See *Mackey* v. *Dillinger*, 73 Penn. St. 85; *Howland* v. *Woodruff*, 60 N. Y. (15 Sick.) 73; S. C., 16 Abb. (N. S.) 411.

§ 13. **Employer's rights as to third persons.** It is one of the general principles of agency that contracts made by the agent inure to the benefit of the principal, and he may enforce them in his own name, or

in his own name maintain an action for non-performance. See *ante*, title *Agency*, Vol. 1, p. 282. This principle applies fully to factors although they may themselves be entitled to sue upon the contract, and though the principal may not have been disclosed. *Hogan* v. *Shorb*, 24 Wend. 461; *Taintor* v. *Prendergrast*, 3 Hill, 72; *Conklin* v. *Leeds*, 58 Ill. 178. This rule is, of course, subject to what has been already said in reference to the right of set-off. See *ante*, § 10.

The principal can follow his property so long as he can trace it or its proceeds in the hands of the factor or his representatives or assigns, without value (*Veil* v. *Mitchel*, 4 Wash. [C. C.] 105; *Fahnstock* v. *Bailey*, 3 Metc. [Ky.] 49; *Farmers & Mechanics' Bank* v. *King*, 57 Penn. St. 202; *Sheffer* v. *Montgomery*, 65 id. 329; *Green* v. *Haskell*, 5 R. I. 447); and a person who takes the property in payment of the antecedent debt of the factor is not protected. *Warner* v. *Martin*, 11 How. (U. S.) 209. But since the factor is an agent for the purpose of sale, he can bind his principal by a sale made in the usual course of business, although he may thereby violate his duty to his principal and become liable to him. *Veil* v. *Mitchel*, 4 Wash. (C. C.) 105; *Taylor* v. *Plumer*, 3 M. & S. 562.

§ 14. **Factor's lien.** It has for a long time been regarded as settled law that a factor has a lien upon property of the principal in his possession for his commissions, advances, and expenses. *Kruger* v. *Wilcox*, 1 Amb. 252; *Bryce* v. *Brooks*, 26 Wend. 367; *Sawyer* v. *Lorillard*, 48 Ala. 332; *United States* v. *Villalonga*, 23 Wall. 35; *Ohio & M. R. R.* v. *Kasson*, 37 N. Y. (10 Tiff.) 218; Story on Agency, § 34; Whart. on Agency, § 766, *et seq.* This lien covers a general balance on the accounts between the factor and the principal so far as concerns the business of factorage. *Winter* v. *Coit*, 7 N. Y. (3 Seld.) 288; *Grieff* v. *Cowgwill*, 2 Dis. (Ohio) 54; *Myer* v. *Jacobs*, 1 Daly (N. Y.), 32; *Winne* v. *Hammond*, 37 Ill. 99; *Reynolds* v. *Davis*, 5 Sandf. (N. Y.) 267; *Sewall* v. *Nichols*, 34 Me. 582. But a lien for specific expenses does not exist when the general balance of accounts is against the factor. *Enoch* v. *Wehrkamp*, 3 Bosw. (N. Y.) 398. The lien, however, does not attach until the goods have come into the possession of the factor with the owner's consent. *Marine Bank* v. *Wright*, 48 N. Y. (3 Sick.) 1; *Brown* v. *Wiggin*, 16 N. H. 312; *Rice* v. *Austin*, 17 Mass. 197; *Byers* v. *Danley*, 27 Ark. 77; *Bruce* v. *Andrews*, 36 Mo. 593; *Winter* v. *Coit*, 7 N. Y. (3 Seld.) 288; *Elliot* v. *Bradley*, 23 Vt. 217. But, while the factor's lien usually attaches to property only when it has come into the actual possession of the factor, yet a merely constructive possession may in some cases give a lien. Thus, when a commission merchant has accepted drafts upon the credit of a particu-

lar assignment, there is a specific pledge of the property, and a transfer of it to the factor takes place by the delivery or indorsement to him of the bill of lading, so that it is constructively in his possession and he has a lien upon it for his indemnity the moment it is shipped or consigned to him. *Anderson* v. *Clark*, 2 Bing. 20: *Haille* v. *Smith*, 1 Bos. & Pul. 563; *Heard* v. *Brewer*, 4 Daly (N. Y.), 136; *Dows* v. *Greene*, 24 N. Y. (10 Smith) 638; *Hall* v. *Hinks*, 21 Md. 406; *Holbrook* v. *Wight*, 24 Wend. 169. In the absence of a bill of lading the intention to vest the property in the goods in the consignee so as to give him the constructive possession may be inferred from other documents. *Bryans* v. *Nix*, 4 M. & W. 791; *Heard* v. *Brewer*, 4 Daly (N. Y.), 136. But, unless there be evidence of an express or implied agreement to transfer the title to the consignee, he acquires no lien until the goods come into his actual possession. *Bank of Rochester* v. *Jones*, 4 N. Y. (4 Comst.) 497; *Allen* v. *Williams*, 12 Pick. (Mass. 297; *Winter* v. *Coit*, 7 N. Y. (3 Seld.) 288; *Mitchell* v. *Ede*, 11 Ad. & El. 888. Nor will the factor acquire a lien for a balance due, merely by the transfer of a bill of lading, upon the credit of which he has made no advances. *Ryberg* v. *Snell*, 2 Wash. (C. C.) 405. If an advance is made on the promise of a consignment, previous to the delivery of possession, the lien attaches as soon as the possession is acquired under the antecedent promise, and is effective when adverse rights have not intervened. *Campbell* v. *Penn*, 7 La. Ann. 371.

A factor can have no lien on goods the possession of which he has acquired by an illegal act or in bad faith. *Kinloch* v. *Craig*, 3 Term R. 119; *Bruce* v. *Wait*, 3 M. & W. 15; *Bank of Rochester* v. *Jones*, 4 N. Y. (4 Comst.) 497, 501. The factor has no lien to secure debts which accrued prior to the commencement of his agency (Russell on Merc. Agents, 162; *Houghton* v. *Matthews*, 3 Bos. & Pul. 485, 488); and it has been said that a factor will have no lien for commissions where he has been guilty of negligence or unskillfulness in his employment. Russell on Merc. Agents, 161; Story on Agency, § 325.

The factor's lien extends not only to the goods, but after a sale of the goods, to whatever the sale produces, whether the cash or securities, so far as the latter are in his possession or in the possession of his representatives. *Drinkwater* v. *Goodwin*, Cowp. 251; *Houghton* v. *Matthews*, 3 Bos. & Pul. 489; *Dodsley* v. *Varley*, 12 Ad. & Ell. 632; *Spring* v. *Ins. Co.*, 8 Wheat. 268; *Brander* v. *Phillips*, 16 Pet. 121; *Jarvis* v. *Rogers*, 15 Mass. 389; *Burrill* v. *Phillips*, 1 Gal. 360; 1 Am. Lead. Cas.; Wharton on Agency, § 775. The principal cannot defeat the factor's lien by making a sale of the property, and the purchaser who takes the goods under such circumstances takes them subject to the lien.

Drinkwater v. *Goodwin*, Cowp. 251; Wharton on Agency, § 777. The factor may retain the goods for the protection of his lien, and if they are tortiously taken from his possession, he may recover them. *Bank* v. *West*, 46 Me. 15; *Cook* v. *Kelly*, 9 Bosw. 358. See *ante*, § . So he may hold the goods under his lien against an attachment levied against his principal. *Green* v. *Clarke*, 12 N. Y. (2 Kern.) 343; *Brownell* v. *Carnley*, 3 Duer, 9. He may enforce his lien by sale after notice and demand. See *ante*, 301.

A factor waives his lien by a voluntary surrender of the property (*Lickbarrow* v. *Mason*, 6 East, 21, 27; Russell on Merc. Agents, 172); or by an unauthorized sale, or by tortiously pledging the property. *Jarvis* v. *Rogers*, 15 Mass. 389, 396; *Holly* v. *Huggeford*, 8 Pick. 73, 76.

So, he loses his lien by taking the property upon which it attaches in execution at his own suit (*Jacobs* v. *Latour*, 5 Bing. 130, 132; Edwards on Factors, § 78); or by setting up another and un untenable claim upon the property (*Winter* v. *Coit*, 7 N. Y. [3 Seld.] 288); or, generally, by his neglect to enforce it. *Grieff* v. *Cowgwill*, 2 Disney (Ohio), 54.

A tender of the amount due will also discharge the lien. *Scarfe* v. *Morgan*, 4 Mees. & W. 270; *Jones* v. *Tarleton*, 9 id. 675.

In Louisiana, a factor does not lose his privilege or lien upon a crop of cotton, for supplies furnished toward its cultivation, by buying the crop at a sheriff's sale — inasmuch as by such sale the lien is transferred from the thing sold to the proceeds. *Howe* v. *Whited*, 21 La. Ann. 495.

§ 13. **Compensation, commissions, etc.** A commission is defined to be an allowance or compensation to an agent, factor, or other person who manages the affairs of others, for his services in performing the same. 1 Bouv. Dict. 298.

It is not limited to a compensation or percentage on the receipt, payment, or transmission of money, or its equivalent, but embraces the allowance for a great variety of services not connected with those duties. *Stevenson* v. *Maxwell*, 2 Sandf. Ch. 273, 284.

A *del credere* commission includes, in addition to the ordinary compensation, a premium given by the principal to the agent in return for a guarantee by the latter of the solvency of the persons with whom he deals on the principal's behalf. Russell on Merc. Agents, 125. See *ante*, § 2; *Colton* v. *Dunham*, 2 Paige's Ch. 267.

The right to commissions is regulated either by special agreement or by the usage of trade. Where there is an express agreement this of course binds the parties and excludes any recourse to usage. *Bower* v.

Jones, 8 Bing. 65; *Wadsworth* v. *Allcott*, 6 N. Y. (2 Seld.) 64; *Evans* v. *Myers*, 25 Penn. St. 114.

A commission is to be estimated in money, and the factor has no right to take and apply part of the property for his compensation. *McCune* v. *Erfort*, 43 Mo. 134.

The factor's right to commissions depends on the faithful performance of his duties (*Boston Carpet Co.* v. *Journeay*, 36 N. Y. [9 Tiff.] 384; *Jones* v. *Hoyt*, 25 Conn. 386); and he forfeits all compensation by misconduct in the business intrusted to him. *Adams* v. *Capron*, 21 Md. 186; *Boston Carpet Co.* v. *Journeay*, 36 N. Y. (9 Tiff.) 384. Whether a factor is entitled to commissions on a sale on credit where the purchaser fails depends on usage. *Clark* v. *Moody*, 17 Mass. 145. He cannot charge a commission for accepting a draft and also a further commission for paying it, nor is he entitled to a commission on a balance carried forward from one year to another. *Mills* v. *Johnston*, 23 Tex. 308.

CHAPTER LXV.

FALSE IMPRISONMENT.

ARTICLE I.

OF FALSE IMPRISONMENT IN GENERAL.

Section 1. Definition and nature. False imprisonment is a trespass committed by one man against the person of another, by unlawfully arresting him, and detaining him without any legal authority. *Crowell* v. *Gleason*, 10 Me. 325; *Colter* v. *Lower*, 35 Ind. 285; S. C., 9 Am. Rep. 735. And see *Letzler* v. *Huntington*, 24 La. Ann. 330; *Harvey* v. *Mayne*, 6 Ir. C. L. 417, C. P. To constitute the injury of false imprisonment two things are, therefore, requisite: 1. The detention of the person; and, 2. The unlawfulness of such detention. Every confinement of the person is an imprisonment, whether it be in a common prison, in a private house, in the stocks, or even by forcibly detaining one in the public streets. *Floyd* v. *State*, 12 Ark. 43; 2 Broom & Had. Com. (Wait's ed.) 117. False imprisonment may also arise from the arrest or detention of the person by an officer without a warrant, or by an illegal warrant, or by a legal warrant executed at an unlawful time. Id.; Add. on Torts, 575. And see *Hackett* v. *King*, 6 Allen, 58.

The plaintiff must show that the defendant imprisoned him, or caused it to be done. *Allen* v. *London and South Western Railway Co.*, L. R., 6 Q. B. 65; 40 L. J. Q. B. 55; 23 L. T. (N. S.) 612.

§ 2. **Constructive imprisonment.** To constitute a false imprisonment it is not necessary that the person should be actually arrested or assaulted. A demonstration looking to an arrest, which, to all appearances, can only be avoided by submission, operates as effectually, if submitted to, as if the arrest had been forcibly accomplished without such submission. *Brushaber* v. *Stegemann*, 22 Mich. 266; *Ahern* v. *Collins*, 39 Mo. 145; *Mowry* v. *Chase*, 100 Mass. 79; *Hawk* v. *Ridgway*, 33 Ill. 473. See, also, *Smith* v. *State*, 7 Humph. (Tenn.) 43; *Johnson* v. *Tompkins*, 1 Baldw. (C. C.) 571. It is an imprisonment to stop and prevent one by threats from passing along the highway. *Bloomer* v. *State*, 3 Sneed (Tenn.), 66. So, if a person is restrained from leaving a room, or going out of a house, without the presence of a constable,

this infringement of his personal liberty will constitute an imprisonment. *Warner* v. *Riddiford*, 4 C. B. (N. S.) 206. And see *Bridgett* v. *Coyney*, 1 M. & R. 211. And it is held, "if you put your hand upon a man, or tell him he must go with you, and he goes, supposing you have the right and the power to compel him, that is an arrest." *Wood* v. *Lane*, 6 Carr. & P. 774. See *Whithead* v. *Keyes*, 3 Allen, 495; *Lansing* v. *Case*, 4 N. Y. Leg. Obs. 221; *Searls* v. *Viets*, 2 N. Y. Sup. (T. & C.) 224.

A partial restraint of the will of a person is not, however, sufficient to constitute an imprisonment. The imprisonment is something more than the mere loss of power to go wherever one pleases; it includes the notion of restraint within some limits defined by a will or power exterior to our own. A prison must have a boundary, and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the bounds of which the party imprisoning would confine him, except by prison-breach. *Bird* v. *Jones*, 7 Q. B. 743. And where the plaintiff attempted to pass in a particular direction, but was prevented by the defendant from going in any direction but one, not being that in which he had endeavored to pass, this was held to be no imprisonment. Id. So, where A has a chamber adjoining the chamber of B, and has a door opening into it, by which there is an exit, and A has another door which C stops so that A cannot go out by that, there is no imprisonment of A by C, because A may go out by the door in the chamber of B, though he be a trespasser by doing it. *Wright* v. *Wilson*, 1 Ld. Raym. 739.

But where a person went to a bank on business, and remained after the usual hour of closing the bank, and the teller locked the door, and thereby detained him, — the detention was held to be a wrongful imprisonment, notwithstanding the person detained knew the usual hour of closing the bank. *Woodward* v. *Washburn*, 3 Denio, 369.

§ 3. **Privileged persons.** A ministerial officer is protected in the execution of process regular on its face, although the party arrested may be privileged from arrest (*Tarlton* v. *Fisher*, 2 Doug. 671; *Cameron* v. *Lightfoot*, 2 W. Bl. 1190; *Chase* v. *Fish*, 16 Me. 136; *State* v. *Hamilton*, 9 Mo. 794); for the officer is not bound to take notice of a claim of privilege from arrest, which is personal to the party, since he is not vested with authority to judge and determine the validity of the claim, which may properly be contested. Id.; *Brown* v. *Getchell*, 11 Mass. 11; *Cable* v. *Cooper*, 15 Johns. 152; *Wood* v. *Kinsman*, 5 Vt. 588. And if one privileged from arrest be imprisoned on an execution in the life of it, and according to its precept, and this was done at the request of the creditor, or his attorney, by a

proper officer, such execution, though ever so erroneous, if not absolutely void, will justify the creditor, or his attorney, in an action for false imprisonment Id. And see *Yearsley* v. *Heane*, 3 D. & L. 265; S. C., 14 M. & W. 322. An arrest in virtue of a *ca. sa.* issued upon a valid judgment in tort, though made in violation of a personal privilege of the party, will not form the ground of an action for false imprisonment. *Deyo* v. *Van Valkenburgh*, 5 Hill, 242. Though it is otherwise if the judgment has been paid or otherwise discharged. Id. Nor does an action lie against a sheriff or his officer for arresting a party attending under a summons from a court, although it be alleged that the party was thereby privileged, and that the defendant knew the fact, and made the arrest maliciously. *Magnay* v. *Burt*, 5 Q. B. 381; S. C., 1 Dav. & M. 652. And see *Moore* v. *Chapman*, 3 Hen. & M. (Va.) 260.

Exemption from arrest is a personal privilege, which may be waived, and a party will be deemed to have waived his privilege, unless he avail himself of the first opportunity to assert it and obtain his liberty. *Dow* v. *Smith*, 7 Vt. 465. And see *Woods* v. *Davis*, 34 N. H. 328; *Hess* v. *Morgan*, 3 Johns. Cas. 84.

§ 4. **Defective or void process.** If the imprisonment has been extra-judicial, without legal process, it is false imprisonment. *Colter* v. *Lower*, 35 Ind. 285; S. C., 9 Am. Rep. 735. See, also, *Bauer* v. *Clay*, 8 Kans. 580; *Bonesteel* v. *Bonesteel*, 28 Wis. 245; 30 id. 511. Thus, if an officer, who has no jurisdiction, issues a warrant under which a party is arrested or imprisoned, all persons instrumental in procuring it are trespassers and liable to an action for false imprisonment. *Lansing* v. *Case*, 4 N. Y. Leg. Obs. 221; *Poulk* v. *Slocum*, 3 Blackf. 421. But such an action is not maintainable when the process is irregular merely, and not void. *Johnson* v. *Maxon*, 23 Mich. 129; *Reddell* v. *Pakeman*, 2 Cr., M. & R. 30; S. C., 5 Tyr. 721; *Reynolds* v. *Corp*, 3 Caines, 267. In such case the plaintiff must procure the irregular process to be set aside before he can maintain an action. But after it is set aside it ceases to be a justification, and is as if it never had existed. *Chapman* v. *Dyett*, 11 Wend. 31; *Ackroyd*, v. *Ackroyd*, 3 Daly (N. Y.), 38; *Rosenfield* v. *Palmer*, 5 id. 318. Under a village charter providing for the amount of a fine which it authorizes to be imposed on conviction of certain offenses, "to be made of the property of the defendant, if any such can be found," and if not, then imprisonment, a judgment that, in case the defendant did not pay the fine and costs, she should be at once committed to the county jail, is unauthorized. And proceedings resulting in such a judgment, and a *mittimus* void on its face on the same

ground, afford no justification to the justice before whom they were taken, or to the officer who executed them, against the action of the person thereby unlawfully imprisoned. *Sheldon* v. *Hill*, 33 Mich. 171. See *Low* v. *Evans*, 16 Ind. 486; *State* v. *Parker*, 75 N. C. 249.

§ 5. **Upon an order of a judge or court.** All judges of a court of record have power to commit to the custody of their officer *sedente curia*, by oral command, without any warrant made at the time. *Kemp* v. *Neville*, 10 C. B. (N. S.) 523. This process, upon the ground that there is in contemplation of law a record of such commitment, which record may be drawn up when necessary. A prisoner is in lawful custody, although committed to prison for the purpose of being brought up again for rehearing, without any warrant or commitment in writing. Id.; Add. on Torts, 576; *Throgmorton* v. *Allen*, 2 Rolle's Abr. 558.

But the law watches personal liberty with vigilance and jealousy; and whoever imprisons another, must do it for lawful cause and in a legal manner. A magistrate has no authority to order a person, accused of a criminal offense, to be committed until a subsequent day, for examination, without the accused being first brought before him. Accordingly, where a justice of the peace issued a warrant for the arrest of an individual, upon a criminal charge, late on a Saturday night, with an indorsement thereon, directing that the accused should be committed until the following Monday, for examination; and an officer arrested the accused, on the same evening, and committed him to jail without first bringing him before the justice,— it was held, that the justice had exceeded his authority, and that he, together with the officer and his assistants, was liable in trespass for false imprisonment. *Pratt* v. *Hill*, 16 Barb. 303. See, also, *Matter of Arthur Henry*, 29 How. (N. Y.) 185; *State* v. *Parker*, 75 N. C. 249. A written order, made by the judges of an election, and imposing a fine for disorderly and riotous conduct at the election, is void if it does not prescribe the length of time for which the party should stand committed if the fine was not paid; and an imprisonment under such order is illegal. *Davis* v. *Wilson*, 65 Ill. 525. See *Trustees* v. *Schroeder*, 58 Ill. 353. And in the case of an arrest without warrant, the duty is equally plain, and for the same reason, to take the arrested party before some officer who can take such proof as may be offered; or, if the circumstances will justify it, hold the suspected party for further examination. Id.

If a prisoner be brought up on *habeas corpus*, issued by a judge who has not jurisdiction of such case, and remanded, this is not a false imprisonment. The proceedings on *habeas corpus* being void, the impris-

onment may be referred to the original warrant. *State* v. *Guest*, 6 Ala. 778.

§ 6. **Upon a warrant or process.** An action for false imprisonment cannot be maintained, for an arrest made upon a sufficient warrant, granted by a magistrate having jurisdiction, against the parties upon whose complaint the warrant was issued. *Waldheim* v. *Sichel*, 1 Hilt. (N. Y.) 45; *Johnson* v. *Maxon*, 23 Mich. 129. But there are certain things requisite to the sufficiency of a warrant which should be observed. Thus, a warrant should contain a command, or requirement in the nature thereof, to the person to whom it is directed to make the arrest. And a mere authority, in the nature of a license or permission to make the arrest, is not sufficient. *Abbott* v. *Booth*, 51 Barb. 546. The direction is an essential part of every warrant; and although, at common law, a warrant may be directed to some indifferent person who is not an officer, yet this practice should not be resorted to, if an officer can conveniently be found. Id.; *Commonwealth* v. *Foster*, 1 Mass. 488. And where the warrant is directed, in the body thereof, "to the sheriff or any constable of the county," in which the magistrate resides, an authority cannot be conferred upon a person who is not an officer, to execute the same, by an indorsement on the back thereof, signed by the justice, "authorizing and empowering" such person to arrest the defendant and bring him before the justice. Such an indorsement is not a direction to the person named therein; and the warrant will afford no justification to him for an arrest made under it. *Abbott* v. *Booth*, 51 Barb. 546. See, also, *Russell* v. *Hubbard*, 6 id. 654; *Bassett* v. *Howorth*, 104 Mass. 224.

The name of the person to be apprehended must also be accurately inserted in the warrant, in order that the officer may know whom to arrest, and that the party whose liberty is threatened may know whether he is bound to submit. *State* v. *Weed*, 21 N. H. 262; *Miller* v. *Foley*, 28 Barb. 630; *Johnston* v. *Riley*, 13 Ga. 97. But see *Allen* v. *Leonard*, 28 Iowa, 529. But a warrant regularly issued against a person whose name is unknown, with a blank left for the name, will justify the arrest of the proper person. *Bailey* v. *Higgins*, 5 Harr. (Del.) 462. See *Wells* v. *Jackson*, 3 Munf. (Va.) 458; *Nichols* v. *Thomas*, 4 Mass. 232. A general and uncertain description is insufficient. *Clark* v. *Bragdon*, 37 N. H. 562; *Sandford* v. *Nichols*, 13 Mass. 289. And it is no justification that the person in fact intended was arrested. *Griswold* v. *Sedgwick*, 6 Cow. 456; S. C., 1 Wend. 126; *Johnson* v. *Riley*, 13 Ga. 97. And see *Shadgett* v. *Clipson*, 8 East, 328; *Morgans* v. *Bridges*, 1 B. & A. 647. So, if it is sought to justify an imprisonment under a warrant of commitment, it must show the

grounds upon which it was granted. *Hall* v. *Howd*, 10 Conn. 514; *Comfort* v. *Fulton*, 13 Abb. (N. Y.) 276. One who procures the arrest and imprisonment of another upon void process is liable to an action for a false imprisonment, and mere good faith in making the affidavit, by virtue of which the arrest is made, is no defense. *Painter* v. *Ives*, 4 Nebr. 122.

A warrant was issued in the county of G., for the apprehension of one accused of an offense committed in the county of N. The officer procured it to be indorsed by a magistrate in the county of M., made the arrest in that county, and took the prisoner to, and imprisoned him in, the county of G. It was held, that he was liable to an action for false imprisonment. *Green* v. *Rumsey*, 2 Wend. 611.

A mere informality in the warrant of arrest, provided the justice have jurisdiction, is not sufficient to sustain an action for false imprisonment, either against the justice who issued the warrant, or the officer who served it. *Cooper* v. *Adams*, 2 Blackf. (Ind.) 294.

A constable making an arrest under a justice's warrant in a civil proceeding is bound to have the warrant in his possession at the time, in order that it may be produced if required. *Galliard* v. *Laxton*, 2 B. & S. 363; S. C., 9 Cox's C. C. 127.

§ 7. **Upon a military order.** With acts affecting military rank or *status* only, or offenses against articles of war or military discipline, the civil courts have uniformly declined to interfere. See *Johnstone* v. *Sutton*, 1 Term R. 546; *United States* v. *Mackenzie*, 1 N. Y. Leg. Obs. 227, 371. But for a malicious exercise by a military officer of lawful authority, or for acts of a military officer or court, in excess of authority, though done in good faith, toward those in the military service, and *a fortiori*, toward those who are not, where the civil laws are in full force, the person injured may obtain redress in the ordinary way, by suit against the wrong-doer. *Tyler* v. *Pomeroy*, 8 Allen, 480. And see *Dynes* v. *Hoover*, 20 How. (U. S.) 65; *Wolton* v. *Gavin*, 16 Q. B. 52; *Wise* v. *Withers*, 3 Cranch, 337; *Mallory* v. *Merritt*, 17 Conn. 178. Thus, an action of trespass is held to lie, for an inferior military officer against his superior officer, who imprisons him for disobedience to an order, made under color, but not within the scope, of military authority, although there be a subsequent trial by court-martial. *Warden* v. *Bailey*, 4 Taunt. 67. So, if a person apprehended as a deserter turns out to be a civilian, and not a recruit or soldier, the parties who apprehended him, or ordered or procured his imprisonment, will be responsible in damages for the wrong done. Add. on Torts, 585. And it was held in Massachusetts, that merely signing a paper in the hands of a municipal officer, containing a promise to serve as a volunteer for

three years from the date of being mustered into the service of the United States, unless sooner discharged, is not sufficient to constitute one a soldier, and render him liable to be seized against his will and taken into camp. *Tyler* v. *Pomeroy*, 8 Allen, 480.

But great latitude is allowed in passing upon the legality of acts done by military officers in the discharge of their duty, in times of public peril. Lord MANSFIELD, in *Wall* v. *McNamara*, Mich. Term, 1779, cited in 1 Term R. 502, 536. And where a military officer, stationed on the line of the territory in time of war, seized a person, who was transporting property toward the enemy's province, under circumstances calculated to create a reasonable suspicion that he was about to transport the same to the enemy, and immediately delivered him over to his superior officer, it was held a sufficient justification, in an action brought by the person so seized for false imprisonment. *Clow* v. *Wright*, Brayt. (Vt.) 118. So, the arrest and confinement of a person under strong suspicion of having aided the escape of deserters from the military service of the United States, was held not to afford any cause of action, under the circumstances, against the person making it. *Teagarden* v. *Graham*, 31 Ind. 422. See, also, on this subject, *Hawley* v. *Butler*, 54 Barb. 490; S. C. before, 48 id. 101; *Hickey* v. *Huse*, 56 Me. 493; *French* v. *White*, 4 W. Va. 170.

In a Texas case, a sergeant, in garrison and on duty adjoining an incorporated city, arrested a citizen with his military guard, while he was outside the garrison grounds, standing in a street of the city, and, with fixed bayonets, escorted him to the garrison, for using insulting words to the sergeant. It was held, that the sergeant, being charged by the laws of the United States with the good order and discipline of the fort, was justified in going out of the fort to remove the citizen and abate the nuisance caused by his abusive language. *Oglesby* v. *State*, 39 Tex. 53.

§ 8. **By an officer without a warrant.** An officer has no power at common law to arrest a person without a warrant merely on suspicion of his having committed a misdemeanor. *Griffin* v. *Coleman*, 4 H. & N. 265; *Bowditch* v. *Balchin*, 5 Exch. 380. See *Willis* v. *Warren*, 17 How. (N. Y.) 101. But a constable has authority, as a conservator of the peace, to arrest a person for a breach of the peace committed within his view, and to detain the offender for a reasonable time, for the purpose of taking him before a magistrate *Reg.* v. *Light*, 7 Cox's C. C. 389; S. C., Dears. C. C. 332; *Levy* v. *Edwards*, 1 Carr. & P. 40; *Vandeveer* v. *Mattocks*, 3 Ind. 479; *Boyleston* v. *Kerr*, 2 Daly (N.Y.), 220; *Commonwealth* v. *Tobin*, 108 Mass. 426; 17 Am. Rep. 375. At common law a police officer is authorized to arrest street

walkers who are prowling about the streets at night. *Mills* v. *Weston*, 60 Ill. 362; *Lawrence* v. *Hedger*, 3 Taunt. 14. But see *Tooley's case*, 2 Ld. Raym. 1296, where there was no reasonable ground of suspicion. The authority of a constable to arrest without a warrant, in cases of felony, is most fully established. The public safety, and the due apprehension of criminals, charged with heinous offenses, imperiously require that arrests should be made without warrants, in such cases, by the officers of the law. And if a constable or other peace-officer has reasonable cause to suspect that a felony has been actually committed, he is justified in arresting and detaining the party suspected, until inquiry can be made by the proper authorities (*Beckwith* v. *Philby*, 6 B. & C. 634; *Lawrence* v. *Hedger*, 3 Taunt. 14; *Davis* v. *Russell*, 5 Bing. 354; *Buckley* v. *Gross*, 3 B. & S. 566; *Holley* v. *Mix*, 3 Wend. 350; *Burns* v. *Erben*, 40 N. Y. [1 Hand] 463; *Johnson* v. *The State*, 30 Ga. 426), although it afterward appears that no felony has been committed (Id.), or that the person arrested was innocent of the charge. *Eanes* v. *The State*, 6 Humph. (Tenn.) 53.

There is no standard or fixed rule as to what is reasonable ground of suspicion which can be made to apply to all cases. The charge may be reasonable or unreasonable with reference to the circumstances and the character of the party making it. And while on the one hand a constable ought to be protected in the execution of his duties, he ought on the other to be guided in the discharge of those duties by ordinary reason, care, and caution. *Hogg* v. *Ward*, 3 H. & N. 417. The probability of an escape or not, if the party is not forthwith arrested, ought to have its proper effect upon the mind of the officer, in deciding whether he will arrest without a warrant; but it is not a matter upon which a jury is to pass, in deciding upon the right of the officer to arrest. The question of reasonable necessity for an immediate arrest, in order to prevent the escape of the party charged with the felony, is one, that the officer must act upon, under his official responsibility, and is not a question to be reviewed elsewhere. Dewey, J., in *Rohan* v. *Sawin*, 5 Cush. 281, 286. See *Davis* v. *Russell*, 2 M. & P. 590; S. C., 5 Bing. 354.

In a case in Minnesota, it was held that when a person is arrested by an officer without a warrant, on suspicion of having committed a felony, and is detained in the custody of such officer for five days, and released without having been taken before a magistrate, there being nothing to prevent the officer from taking the prisoner before a magistrate immediately upon the arrest, the question whether the time of detention is reasonable is a question of law, and it is error to submit it to the jury,

as a question of fact. And the detention in such case is, as a matter of law, unreasonable. *Cochran* v. *Toher*, 14 Minn. 385.

Every unlawful detainer of a prisoner after he has gained a right to be discharged is a fresh imprisonment. *Withers* v. *Henley*, Cro. Jac. 379; Add. on Torts, 578. And an officer who illegally imprisons a person is liable not only for the time he is in the officer's custody, but for all the time of the imprisonment. *Murphy* v. *Countiss*, 1 Harr. (Del.) 143. So, every continuation of an illegal imprisonment being a new trespass, a recovery in an action, commenced during the continuance of the imprisonment, is no bar to another action brought after it has ceased, for an assault, battery, and imprisonment; and if so pleaded, the plaintiff may newly assign, for the continuance of the imprisonment. *Leland* v. *Marsh*, 16 Mass. 389. A superintendent of police, who directs an officer, who has made an arrest without a warrant, to lock the prisoner up, and the detention is illegal, will be liable for a false imprisonment. *Green* v. *Kennedy*, 46 Barb. 16; 48 N. Y. (3 Sick.) 653. In such a case the law requires that the prisoner shall be, "immediately and without delay," conveyed before the nearest magistrate. Id.; *Pesterfield* v. *Vickers*, 3 Coldw. 205. See *ante*, 307, § 4.

If a prisoner escapes from an officer, and the officer advertises him, and retakes and holds him after his writ is returned, he is not liable in an action of false imprisonment. *Strong* v. *Ives*, 1 Root (Conn.), 388. But after a voluntary escape, if the party was in custody on a writ of execution, he cannot be retaken. *Butler* v. *Washburn*, 25 N. H. 258. And a sheriff of a county in one State cannot lawfully pursue and retake in another State a prisoner who has escaped from his custody. *Bromley* v. *Hutchins*, 8 Vt. 194. See *ante*, 229, *Escape*, art. 5, § 2. Provision has, however, been made for the surrender of felons and fugitives from justice, upon application to the executive of a State. See Const. U. S., art. 4, § 2. And where the governor of one State demands a person of the governor of another State, as a fugitive from justice, and the governor of the latter State causes the accused to be arrested and delivered to the person appointed for that purpose by the governor making the demand, such person is not liable for a false imprisonment by reason of any irregularity in the warrant. *Johnstone* v. *Vanamringe*, 5 Blackf. (Ind.) 311.

Generally, an officer who has arrested a party without process, or on void process, wrongfully, cannot detain him on valid process until he has restored such party to the condition he was in at the time of his arrest. The law will not permit him to perpetrate a wrong for the purpose of executing process, nor to use process for the purpose of continuing an imprisonment, commenced without authority, and by his

wrongful act. *Hooper* v. *Lane*, 6 H. L. Cas. 443; *Egginton's case*, 2 Ell. & Bl. 728; *Mandeville* v. *Guernsey*, 51 Barb. 99, 102; S. C. affirmed, 50 N. Y. (5 Sick.) 669. But in North Carolina, where a defendant was in prison under an invalid process, and the sheriff, without telling his deputy, the jailer, that he had in his own hands a valid process, ordered him to retain the prisoner,—it was held, in an action for false imprisonment, that the possession of a valid process by the sheriff was a good defense for the acts of his deputy, though the latter was ignorant of the fact. *Meeds* v. *Carver*, 8 Ired. (N. C.) 298.

§ 9. **By a private person.** The rights and liabilities of private persons, in arresting without warrant, are more restricted than those of peace officers. But, at common law, all persons whatever, who are present when a felony is committed, or a dangerous wound is given, are bound to apprehend the offenders. *Phillips* v. *Trull*, 11 Johns. 486; *People* v. *Adler*, 3 Park. (N. Y.) 254. And a private person may, without warrant, break into another's house and imprison him, to prevent him from committing a murder. *Handcock* v. *Baker*, 2 B. & P. 260. So, any person whatever, if an affray be made, to the breach of the peace, may, without a warrant from a magistrate, restrain any of the offenders, in order to preserve the peace (*Baynes* v. *Brewster*, 2 Q. B. 375; *Price* v. *Seeley*, 10 Cl. & Fin. 39); but after there is an end of the affray, they cannot be arrested without a warrant. 3 Hawk. P. C. 174, ch. 2, § 20; *Phillips* v. *Trull*, 11 Johns. 486. Any one may, likewise, without a warrant, lawfully lay hands upon another to prevent a breach of public decorum; as to turn him out of a church and thus prevent him from disturbing the congregation (Vol. 2, 264); or a funeral ceremony. *Hall* v. *Planner*, 1 Lev. 196; *Glever* v. *Hynde*, 1 Mod. 168. So, if a person be so insane that it would be dangerous to suffer him to be at liberty, any person may, from the necessity of the case, without a warrant, place him under restraint for a reasonable time until proper legal proceedings can be had to confine him. *Davis* v. *Merrill*, 47 N. H. 208. But the mere fact that a man is insane does not justify his arrest and imprisonment, without a warrant, if he is not dangerous to himself or others. *Anderdon* v. *Burrows*, 4 C. & P. 210; *Fletcher* v. *Fletcher*, 1 El. & El. 420; *Colby* v. *Jackson*, 12 N. H. 526. In all such cases the right to exercise restraint has its foundation in a reasonable necessity, and ceases with the necessity. Id.; *Look* v. *Dean*, 108 Mass. 116, 120; 11 Am. Rep. 323.

A private individual may undoubtedly justify the apprehending of another, for felony, without warrant, upon a case of strong suspicion, if, in fact, such a felony were committed. *Holley* v. *Mix*, 3 Wend. 354; *Reuck* v. *McGregor*, 3 Vroom (N. J.), 70. But the burden of

proof is upon him to show, when sued for the arrest, that the circumstances justified the suspicion; and if this is made to appear, he is not liable, although the accused was in fact innocent. Id.; *Hall* v. *Booth*, 3 Nev. & M. 316; *Farnam* v. *Feeley*, 56 N. Y. (11 Sick.) 451. The difference between the authority of a private person and a constable or other peace officer, in this respect, is, that the former is justified only in case it turn out that a felony was in fact committed, but the officer may justify the arrest whether, in fact, a felony were committed or not. *Holley* v. *Mix*, 3 Wend. 354.

But it would seem, as a general rule, that the felony which will justify an arrest by a private person, under the circumstances above stated, must be an offense that may be tried by the courts of the State in which the arrest is made; and if it be committed in a foreign State, and be triable there only, it will not justify such arrest. There may, however, be an exception to this rule, in the case of an arrest of a person charged with the commission of a felony in a foreign State or country, for the purpose of detaining him to await a requisition upon the governor of the State in which the arrest is made, for his extradition, when such arrest is necessary to prevent his escape. *Mandeville* v. *Guernsey*, 51 Barb. 99; S. C. affirmed, 50 N. Y. (5 Sick.) 669; 9 Alb. L. J. 49. But the arrest of a person, by a private individual, without warrant, made for the purpose of forcibly abducting the arrested person from the State, and followed immediately by such abduction, cannot be justified. Such seizure and abduction, of them selves, constitute a criminal offense of a high grade, at common law. Id.; 1 Russ. on Crimes, 716.

The law supposes the principal to be in the custody of his bail; and the bail may take him when and where he chooses, and detain or surrender him into the custody of the sheriff. *Parker* v. *Bidwell*, 3 Conn. 85; *Nicolls* v. *Ingersoll*, 7 Johns. 145. And his authorized agent has the same powers. Id.; *Meddowscroft* v. *Sutton*, 1 Bos. & Pul. 61. But if bail, in arresting their principal, are guilty of unnecessary violence, they will be liable in an action for false imprisonment. *Pease* v. *Burt*, 3 Day (Conn.), 485.

§ 10. **Party aiding an officer.** Every man is bound to aid and assist in preserving the peace and in apprehending offenders, when called upon to do so, by the sheriff or other peace officer, and is punishable, if he refuses. *Coyles* v. *Hurtin*, 10 Johns. 85. Nor has he any right to demand of the officer an inspection of the warrant under which he is acting. It is sufficient that he is the sheriff, or other known public officer, and the command of such officer will be a defense to those rendering assistance in obedience to it. *Main* v. *McCarty*, 15 Ill. 441;

McMahan v. *Green*, 34 Vt. 69. But where the original act of an officer, in the execution of civil process, is clearly unlawful — as, where a sheriff arrests a debtor on execution by breaking open the outer door of his dwelling-house — those aiding him in the performance of it will be trespassers, though they act by his command. *Hooker* v. *Smith*, 19 Vt. 151. And all who aid in the unlawful confinement of another become liable for the false imprisonment, although they rendered no aid in the original arrest, and did not know that the arrest and imprisonment were illegal. *Griffin* v. *Coleman*, 4 H. & N. 265; *Roth* v. *Smith*, 41 Ill. 314. So, if while A is unlawfully imprisoned by B, C commits an assault upon him, C is guilty of the false imprisonment as well as B; and if A sues both separately, the pendency of one suit may be pleaded in abatement to the other. *Boyce* v. *Bayliffe*, 1 Camp. 60. See *Day* v. *Porter*, 2 M. & Rob. 151.

§ 11. **Wrong party imprisoned.** In case a wrong person is arrested through mistake, all persons causing the arrest are liable for the injury (*Davies* v. *Jenkins*, 11 Mees. & W. 754), unless the party complaining has brought the injury upon himself by his own misstatements and misrepresentations. Thus, if there was legal ground for arresting A, and B represents himself to be A, and is arrested in consequence of that representation, he has obviously no valid ground for complaining of the imprisonment which naturally resulted from his own act. But after he has given notice that he is not the person he represented himself to be, he cannot lawfully be detained for a greater length of time than may be reasonably necessary to ascertain which of the several statements he has made is in accordance with the truth. *Dunston* v. *Paterson*, 2 C. B. (N. S.) 495; Add. on Torts, 579.

§ 12. **Officer issuing the process.** If a court of limited jurisdiction issues a process which is illegal, and not merely erroneous; or, if a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause without having gained jurisdiction of the person by having him before it in the manner required by law, the proceedings are void; and in the case of a limited or special jurisdiction, the magistrate attempting to enforce a proceeding founded on any judgment, sentence or conviction, in such a case, becomes a trespasser. *Bigelow* v. *Stearns*, 19 Johns. 39. See, also, *Lange* v. *Benedict*, 8 Hun (N. Y.), 362; *People* v. *Liscomb*, 60 N. Y. (15 Sick.) 559. The rule as to the liability of a justice of the peace is stated to be, that where he has no jurisdiction whatever, and undertakes to act, his acts are *coram non judice* and void, equally so as if he were not a justice. If he has jurisdiction, but errs in exercising it, then his acts are not void, but voidable only. In the former case he is personally liable, in the latter not.

Adkins v. *Brewer*, 3 Cow. 209; *Dyer* v. *Smith*, 12 Conn. 384; *Bauer* v. *Clay*, 8 Kans. 580; 2 Wait's Law & Pr. 11, *et seq.* A court of a justice of the peace has no power to adjudge a person in contempt and to punish him therefor, save in the cases prescribed by statute; and a justice will be liable for a false imprisonment if he causes the imprisonment of a person without a compliance with the requirements of the statute. *Rutherford* v. *Holmes*, 66 N. Y. (21 Sick.) 368. See *Tracy* v. *Williams*, 4 Conn. 113. When a magistrate or other officer having a special and limited jurisdiction issues a warrant to take the person or property of another, he must show upon the face of his proceedings that he has jurisdiction. Nothing will be intended in his favor, and it must appear that he has jurisdiction over the subject-matter, the person and the process. See Id.; *Hall* v. *Howd*, 10 Conn. 514; *Penobscot R. R. Co.* v. *Weeks*, 52 Me. 456. This is so of a court-martial; and he who seeks to enforce its sentences or to justify under its judgments must set forth affirmatively and clearly all facts necessary to show that it was legally constituted and had jurisdiction. *Brooks* v. *Adams*, 11 Pick. 441. So it is a general rule that all judicial acts exercised by persons whose judicial authority is limited as to locality must appear to be done within the locality to which the authority is limited. *Reg.* v. *Totness*, 11 Q. B. 90; *King* v. *Chilverscoton*, 8 Term R. 178. And in England it has been held not sufficient to describe a magistrate as justice *in* the county, nor as justice *for* the county. He must be described as doing the act as "justice in and for the county." *Reg.* v. *Stockton*, 7 Q. B. 520.

Where a magistrate does not have jurisdiction, all who advise or act with him, or execute his process, are trespassers. *Von Kettler* v. *Johnson*, 57 Ill. 109; *Hall* v. *Rogers*, 2 Blackf. 429. And if a person be arrested upon a criminal charge, without any competent evidence of his guilt, the magistrate and prosecutor are jointly liable to an action for false imprisonment. *Wilson* v. *Robinson*, 6 How. (N. Y.) 110; *Comfort* v. *Fulton*, 13 Abb. (N. Y.) 276. But it is held, that, if the facts contained in an affidavit for an order of arrest in a civil action, though slight and inconclusive, yet tend to prove the fraud, and the justice, after examination thereof, issues the order of arrest, no action for false imprisonment will lie for a detention under such order, the other proceedings being regular. *Gillett* v. *Thiebold*, 9 Kans. 427. *Skinnion* v. *Kelly*, 18 N. Y. (4 Smith) 355; *Kissock* v. *Grant*, 34 Barb. 144; *Outlaw* v. *Davis*, 27 Ill. 466. In an early New York case, in an action against a justice for false imprisonment, it was held that the defendant might justify by virtue of a judgment and execution, without showing that he acquired jurisdiction of the person of the

party, or alleging that the party appeared before him, or that he was a resident of the county at the time the summons was issued. *Hoose* v. *Sherrill*, 16 Wend. 33. But see dissenting opinion of Bronson, J., id. 36. In South Carolina, it was held that where a magistrate, who has jurisdiction of the person, issues a warrant of commitment, upon the complaint of another, for an offense over which he has no jurisdiction, he will not be liable for false imprisonment unless his want of jurisdiction is shown on the face of the proceedings. *Miller* v. *Grice*, 1 Rich. (S. C.) 147.

A justice of the peace is liable to an action for false imprisonment for issuing a warrant by virtue of which the putative father of a bastard child is arrested upon the application of an attorney who was not authorized by the overseers of the poor to make the application. *Wallsworth* v. *McCullough*, 10 Johns. 93. And see *Sprague* v. *Eccleston*, 1 Lans. (N. Y.) 74. So, where an overseer of the poor commenced bastardy proceedings before a justice of the peace, who was his son-in-law, and whose wife was still living, and this justice associated another with himself, and after the usual proceedings the justices made an order of filiation, and for the neglect of the party charged to comply with the order, committed him to jail,—it was held that the overseer was a *party* to the proceedings, in such sense that the proceedings were void, and that the justices were liable to an action for false imprisonment. *Rivenburgh* v. *Henness*, 4 id. 208. A justice of the peace, through personal ill-will, procured a constable to serve a warrant for felony nine months after the warrant was issued, the party who caused the warrant to be issued not having made a second application to have it executed; and the constable, also instigated by ill-will, arrested the party against whom the warrant had issued. An action for false imprisonment was held to be maintainable both against the justice and the constable. *Garvin* v. *Blocker*, 2 Brev. (S. C.) 157. See, also, *La Roe* v. *Roeser*, 8 Mich. 537; *Doggett* v. *Cook*, 11 Cush. 262; *Pedley* v. *Davis*, 10 C. B. (N. S.) 492.

Where a party making an arrest is not a known public officer, but assumes to act by special appointment, persons aiding him are bound to know whether he is authorized to make the arrest And if he is a trespasser for want of authority, they are also trespassers; as is likewise a justice of the peace who commits a person thus illegally arrested, for he has acquired no jurisdiction over his person. *Dietrichs* v. *Schaw*, 43 Ind. 175.

A warrant issued by a militia officer, under the provisions of a statute imposing fines for the neglect of military duty, is a ministerial act, and the officer is liable as a trespasser for a mistake as to the law, or for

the issuing of erroneous process. *Batchelder* v. *Whitcher*, 9 N. H. 239. And it is held, that where a person empowered to take testimony, commits, without authority, a witness for refusing to testify, not only he, but all who are present assisting and urging the imprisonment, are trespassers. *Marsh* v. *Williams*, 1 How. (Miss.) 132.

If a magistrate commits a person to prison in a case in which he has no jurisdiction, he is liable for all the circumstances that usually attend the execution of a warrant of commitment, such as the party being handcuffed, having his hair cut short at the prison, and his being put in a bath there; but he is not liable for any violence or excess of the officers. *Mason* v. *Barker*, 1 Carr. & K. (47 Eng. Com. L.) 100. But in a recent case in New York, the defendants caused the arrest of the plaintiff upon an execution, issued upon a judgment, recovered in an action brought before a justice of the peace, to recover a penalty incurred by a violation of an act of the board of supervisors of a county, forbidding any person, except an inhabitant of a certain town, from catching any fish in the creeks, bays or waters of such town. The plaintiff, having paid the amount of that judgment, brought his action to recover damages for false imprisonment, and it was held that he was not entitled to recover. That the validity of the act of the supervisors might lawfully be passed upon by the justice, and that his judgment, while unreversed, and the process issued thereon, protected the officer who executed it, as well as the parties at whose instance it was issued. *Hallock* v. *Dominy*, 15 Alb. Law Jour. 334, reversing S. C., 7 Hun (N. Y.), 52. See *Low* v. *Evans*, 16 Ind. 486.

§ 13. **Private person causing arrest, etc.** A party who procures an illegal arrest to be made is liable in trespass for false imprisonment (*Baird* v. *Householder*, 32 Penn. St. 168; *Sullivan* v. *Jones*, 2 Gray, 570; *Clifton* v. *Grayson*, 2 Stew. [Ala.] 412); though not present aiding and abetting in the arrest (Id.; *Cole* v. *Radcliff*, 4 W. Va. 332); and although, in procuring the arrest, he acted under duress, if he knew the statements were false and intended by them to effect the arrest. *Huggins* v. *Toler*, 1 Bush (Ky.), 193. To cause the arrest of another on void process is a false imprisonment. *Allen* v. *Greenlee*, 2 Dev. (N. C.) 370; *Luddington* v. *Peck*, 2 Conn. 700; *Bauer* v. *Clay*, 8 Kans. 580. And although a person is arrested under a legal warrant, and by a proper officer, yet, if one of the objects of the arrest is thereby to extort money, or to enforce the settlement of a civil claim, such arrest is a false imprisonment by all who have directly or indirectly procured the same, or participated therein, for any such purpose. *Hackett* v. *King*, 6 Allen, 58. And see *Severance* v. *Kimball*, 8 N. H. 386; *Breck* v. *Blanchard*, 22 id. 303. An action for false imprisonment

will likewise lie where a warrant of arrest has been issued upon an insufficient affidavit. *Vredenburgh* v. *Hendricks*, 17 Barb. 179; *Cody* v. *Adams*, 7 Gray, 59; *Smith* v. *Bouchier*, 2 Str. 993. And if a person directs an officer to take another into custody, it is sufficient to support the action (*Hopkins* v. *Crowe*, 7 Carr. & P. 373; *Wheeler* v. *Whiting*, 9 id. 262); but if he merely communicates facts or circumstances of suspicion to the officer, leaving him to act on his own judgment and responsibility, he is not liable. Id.; *Brown* v. *Chadsey*, 39 Barb. 253; *Grinham* v. *Willey*, 4 H. & N. 496. Nor is a party liable in an action for false imprisonment who, seeing a man in the custody of an officer for a supposed offense, points out another as the real criminal, but without directing the officer to take that one into custody. *Gosden* v. *Elphick*, 4 Exch. 445.

While the master is responsible, civilly, for the fraud, negligence, or other wrongful act of his servant, committed in the transaction of his business (*Griswold* v. *Haven*, 25 N. Y. [11 Smith] 595), he is not responsible for the willful injury committed by the servant while so engaged, unless he so act by the express or implied authority of his employer. *Wright* v. *Wilcox*, 19 Wend. 343. And where the superintendent and clerks called an officer into the store of their employer, and directed him to arrest and examine the person of a lady suspected of stealing goods, which was done without the knowledge or the express or implied authority of the owner of the goods, it was held that the master was not liable. *Mali* v. *Lord*, 39 N. Y. (12 Tiff.) 381. The servant is not impliedly authorized by his master to do that which the master himself, being present, would not be authorized to do. Id.

Nor is a town liable for the unauthorized, illegal, and oppressive acts of an officer in committing a person to prison without a *mittimus* or warrant of committal. *Trustees* v. *Schroeder*, 58 Ill. 353.

§ 14. **Mode of executing process by officer.** A regular officer is not bound to exhibit his authority or process when he makes an arrest within his proper district (*Arnold* v. *Steeves* 10 Wend. 515), even though demanded. *Bellows* v. *Shannon*, 2 Hill (N. Y.), 86. He should however, either before or at the moment of arrest, make known in some form that he comes in his official character, and not in that of a mere wrong-doer; as otherwise he may be lawfully resisted. Id.; *Commonwealth* v. *Field*, 13 Mass. 321. And after the party has submitted to the arrest, the officer, if required, is bound to inform him of the *substance* of the warrant or process. *Bellows* v. *Shannon*, 2 Hill (N. Y.), 86. And it is held that a special deputy is bound to show his warrant, if requested to do so, on making an arrest, and if he omit, the party may resist, and the warrant, under such circumstances, is no pro-

tection against an action for an assault, battery, and false imprisonment. *Frost* v. *Thomas*, 24 Wend. 418.

In making an arrest, it is the usual practice to put the hand upon the individual, and any touching, however slight, is sufficient. *Anonymous*, 7 Mod. 8. And see *ante*, 306, § 2. But each case must depend upon its own peculiar circumstances; and it is held, that, to constitute an arrest which, if unlawful, is sufficient to maintain an action for false imprisonment, an actual manual touching of the body is not required; but only whatever is equivalent, amounting to to a restraint of liberty of the person. *Searls* v. *Viets*, 2 N. Y. Sup. (T. & C.) 224. See *Pike* v. *Hanson*, 9 N. H. 491; *Courtoy* v. *Dozier*, 20 Ga. 369; *Grainger* v. *Hill*, 3 Scott, 561; *Genner* v. *Sparks*, 6 Mod. 173. Though it seems, if bare words be relied upon to constitute an arrest, there must exist the power to take immediate possession of the body, and the party's submission thereto. Id.; *Strout* v. *Gooch*, 8 Me. 127; *Chinn* v. *Morris*, 2 Carr. & P. 361. In order to retain his arrest, an officer is not bound to keep his hands upon a prisoner, or secure him. But if the arrest is one that requires the prisoner to be committed, it is the duty of the officer to take him to jail as soon as he reasonably can. It is for the officer to judge of the hour at which he will start, and of the propriety of starting on account of the weather, and of the personal restraint necessary to secure the prisoner; and he is not liable to the prisoner for any injury he may receive thereby, unless he needlessly expose the prisoner's health, or does him an unnecessary personal injury. *Butler* v. *Washburn*, 25 N. H. 251. See *Whitcomb* v. *Cook*, 38 Vt. 477; *Francisco* v. *State*, 4 Zabr. (N. J.) 30.

A person convicted and sentenced to imprisonment by a court having no jurisdiction is entitled to his action against those who keep him in confinement. *Patterson* v. *Prior*, 18 Ind. 440. And see *Cobbett* v. *Grey*, 4 Exch. 729. But see *Olliet* v. *Bessey*, T. Jones, 214; *Smith* v. *Shaw*, 12 Johns. 257. So, it has been held, that a jailer who receives and detains one given into his custody under a warrant, takes the risk of the warrant having been executed against the proper person; and though acting *bona fide*, and without the means of ascertaining the identity of the individual named in the warrant, he is liable to an action for false imprisonment, if, by mistake of the officer to whom it was directed, it was executed against another. *Aaron* v. *Alexander*, 3 Camp. 35.

Public ministerial officers must set forth, in their returns, the acts done by them, that the court may judge of their sufficiency. *Henry* v. *Tilson*, 19 Vt. 447.

And an officer cannot in general justify an arrest under process

which is returnable, without such return. *Tubbs* v. *Tukey*, 3 Cush. 438; *Shorland* v. *Govett*, 5 B. & C. 485; *Poor* v. *Taggart*, 37 N. H. 544. But an officer who returns upon a warrant for the collection of a tax assessed upon real estate, to a non-resident owner thereof, that, "having made diligent search for goods of" the said owner, "and for goods upon the said real estate, whereon to levy this warrant," he arrested the said owner, does not make himself liable as a trespasser by not more distinctly stating that he was unable to find such goods. *Snow* v. *Clark*, 9 Gray, 190. And see *Stevens* v. *Kent*, 26 Vt. 503; *Gordon* v. *Clifford*, 28 N. H. 402. This is upon the ground that the court will make all reasonable intendments in favor of the officer's return. Ib.

If an officer executes process after the return day, without authority of the plaintiff, the officer alone is liable. *Adams* v. *Freeman*, 9 Johns. 117. But if he does so by the direction of the plaintiff and his attorney, they are all trespassers. *Vail* v. *Lewis*, 4 id. 450.

§ 15. **Form of action.** An action for a false imprisonment is an action for the defendants' having done that which, upon the stating of it, is manifestly *illegal*. *Johnstone* v. *Sutton*, 1 Term R. 544. And see *Henderson* v. *Jackson*, 9 Abb. (N. S.) 293, 300; S. C., 40 How. 168; 2 Sweeny, 324. And trespass, not case, is the proper, though not the exclusive, form of action for a false imprisonment. *Stanton* v. *Seymour*, 5 McLean (C. C.), 267. And see *Brown* v. *Chadsey*, 39 Barb. 258, 260. Thus, trespass lies for an arrest under process void in itself, or issued by a court without jurisdiction (*Allen* v. *Greenlee*, 2 Dev. [N. C.] 370); as for instance, an arrest under a void warrant. *Price* v. *Graham*, 3 Jones (N. C.), 545 And trespass is the proper remedy for an illegal *detention*, though the previous imprisonment was lawful. *Magnay* v. *Burt*, 5 Q. B. 381. But in case of an arrest on process issuing out of a court having no jurisdiction, trespass on the case may be brought, where malice and falsehood are the gravamen of the offense, and the false imprisonment is only an incident. *Morris* v. *Scott*, 21 Wend. 281; *Platt* v. *Niles*, 1 Edm. Sel. Cas. (N. Y.) 230. And it is said that, whenever an injury to a person is effected by the regular process of a court of competent jurisdiction, though maliciously adopted, case is the proper remedy, and trespass cannot be maintained. 1 Chit. Pl. 187, 188. And see *Sleight* v. *Ogle*, 4 E. D. Smith (N. Y.), 445; *Watson* v. *Watson*, 9 Conn. 140; *ante*, title *Case*, *Action on*, Vol. 2, 99–127.

§ 16. **Damages.** The plaintiff, in an action for false imprisonment, is entitled to recover damages for the wrong done to him, without regard to the motives of the defendant, or the circumstances attending the doing of the wrongful and unlawful act. And though the act

complained of was done without malice, yet being unlawful and in violation of the plaintiff's rights, he is entitled to recover, not only for the costs he has incurred, but for the loss of time, interruption to his business, and the suffering, bodily and mental, which the act may have occasioned. *Parsons* v. *Harper*, 16 Gratt. (Va.) 64; *Bonesteel* v. *Bonesteel*, 30 Wis. 511; *Clark* v. *Newsam*, 1 Exch. 131. And he may recover more than nominal damages, without allegation or proof of special damage. *Page* v. *Mitchell*, 13 Mich. 63; *Josselyn* v. *McAllister*, 22 id. 300. And if the wrong was committed from a bad motive (*McCall* v. *McDowell*, 1 Abb. [U. S.] 212; *Hamlin* v. *Spaulding*, 27 Wis. 360); or was accompanied by personal insult, or by a false charge of a violation of law, exemplary damages may be recovered. *Warwick* v. *Foulkes*, 12 M. & W. 507; S. C., 1 Dowl. & L. 638; *Bauer* v. *Clay*, 8 Kans. 580; *Fellows* v. *Goodman*, 49 Mo. 62. "The court never interferes with the discretion of the jury as to the amount of damages for an assault and false imprisonment, unless they are grossly excessive, or clearly founded upon a mistaken or improper view of the matter." TINDAL, C. J., in *Edgell* v. *Francis*, 1 M. & G. 222; 1 Sc. N. R. 121. And see *Huckle* v. *Money*, 2 Wils. 206; *Page* v. *Mitchell*, 13 Mich. 63; *Webber* v. *Kenny*, 1 A. K. Marsh. (Ky.) 345.

Where C. procured B. to assume to be an officer and arrest a minor, and P. to assume to be a justice, and after the form of a trial to render judgment against the minor for three dollars, on a charge of breaking C.'s show case, threatening to commit him to jail unless he obtained sureties for the payment, detaining him for two hours in procuring such sureties, and preventing him from consulting an attorney, it was held that a verdict in his favor for the outrage in $125 was fully justifiable, if not too mild. *Price* v. *Bailey*, 66 Ill. 48. See, also, *Fellows* v. *Goodman*, 49 Mo. 62.

Where a private person makes an arrest under circumstances which do not justify him, but would justify an officer, he should be held to pay reasonable and fair damages, according to the circumstances, mitigated by the reasonable or probable causes that induced it. And where an arrest of this kind was made upon strong grounds for suspecting larceny, a verdict of $3,000, in an action for false imprisonment, was set aside as excessive. *Reuck* v. *McGregor*, 32 N. J. Law, 70.

An administratrix and her husband, who had possession of assets of the estate, fraudulently refused to pay a claim allowed by the county court, and the creditor, in good faith and without malice, procured an order of commitment, which was void for want of jurisdiction. In an action against the creditor by the husband for false arrest and imprisonment, it was held that proof that the husband refused to let the wife

pay the claim, and suffered her to be committed to an offensive jail, was admissible in mitigation of damages; and that a verdict for $2,000 was excessive, and ground for reversal. *Johnson* v. *Vonkettler*, 66 Ill. 63.

The plaintiff was arrested, without a warrant, while quietly passing along the streets, on the charge of having been intoxicated on the streets in the morning or middle of the same day, though he was sober at the time of the arrest. He was forcibly taken before a magistrate without any authority being shown, though demanded, and when brought before the officer, then engaged in other business, he was unlawfully committed to the calaboose for abusive language to the magistrate, where he was detained during the night. It was held (1) that he was entitled to recover against the defendants so arresting and detaining him, in an action of trespass for assault and battery and false imprisonment. That a verdict for $200 was greater than should have been allowed, but not so flagrantly excessive as to justify setting aside the verdict of the jury on the ground that it was the result of passion or prejudice. *Newton* v. *Locklin*, 77 Ill. 103

A plaintiff cannot recover damages in respect of having been detained beyond a certain hour, whereby he missed an opportunity of being taken into an employment in a shop or factory, the damages being too remote. *Hoey* v. *Felton*, 11 C. B. (N. S.) 142.

ARTICLE II.

DEFENSES.

Section 1. In general. In an action for a false imprisonment, the gist of the action is an unlawful detention. Malice in the defendant will be inferred, so far at least as to sustain the action, and the only bearing of evidence to show or disprove actual malice is upon the question of damages. So, also, probable cause, or reasonable grounds of suspicion against the party arrested, afford no justification of an arrest or imprisonment which is without authority of law. There are some cases in which the existence of reasonable ground of suspicion is spoken of as a defense in actions for false imprisonment; but upon examination it will be found that these cases turn upon the authority given to magistrates in particular instances to arrest upon suspicion merely, to prevent or punish crimes, and in which, therefore, a reasonable suspicion is a sufficient authority and justification for an arrest (see *ante*, 311, art. 1, § 8); or else they are cases in which the actual commission of a felony was first proved, and the case turned upon the

ground for suspecting the person arrested. See *West* v. *Baxendale*, 9 C. B. 141. What is a reasonable and probable cause is an inference to be drawn not by the jury, but by the judge, from the facts found by the jury. *Listor* v. *Perryman*, 4 L. R., H. L. Cas. 521; 39 L. J. Exch. 177; 23 L. T. (N. S.) 269; 19 W. R. 9; *Munns* v. *Dupont*, 3 Wash. (C. C.) 31. If the question of probable cause rests on conflicting evidence, it must be submitted to the jury to find the facts. *Mitchell* v. *Wall*, 111 Mass. 492. In the case of an arrest by a private person, there can be no justification and no defense to the action, unless it first be shown that a felony has been actually committed by some one, and that there were reasonable grounds to believe that the person arrested was the guilty individual. *Ante*, 314, art. 1, § 9. A plea in justification must allege the commission of an offense which justified the arrest, and also state the facts which gave rise to the suspicion. *Brown* v. *Chadsey*, 39 Barb. 253. So, a plea which attempts to justify the arrest and imprisonment must identify the trespass justified with that complained of, or it will be bad on demurrer. *Gallimore* v. *Ammerman*, 39 Ind. 323; *Scircle* v. *Neeves*, 47 id. 289.

§ 2. **By legal process.** The defendant, in an action for a false imprisonment, may justify by showing that he procured the arrest to be made, under and by virtue of a regular and valid warrant (*Floyd* v. *State*, 12 Ark. 43); or that the defendant, as sheriff, arrested the plaintiff by virtue of an execution issued against his person. *Yingling* v. *Hoppe*, 9 Gill. 312. But the defense that the imprisonment was under lawful process must be specially pleaded. *Allen* v. *Parkhurst*, 10 Vt. 557. And it has been held, that in order to exempt one from liability for a false imprisonment in causing an arrest on mesne process, it must be apparent, not only that he believed, but also that he had reason to believe, the essential fact averred in his affidavit, as in this instance, that the debtor was about to leave the State. *Gee* v. *Patterson*, 63 Me. 49. It is not necessary to a constable's justification of an arrest under a *capias ad respondendum*, issued by a justice, in Indiana, that the writ should be supported by an affidavit. *Davis* v. *Bush*, 4 Blackf. (Ind.) 330. But it is otherwise if the justification be attempted by the party or the justice. Id.

§ 3. **For breach of peace or felony.** A plea in justification of an arrest without a warrant, by reason of an affray, or for the purpose of preserving the peace, must aver an existing affray or breach of the peace at the time of the arrest, or a well-founded apprehension of its renewal. See *ante*, 311, art. 1, § 8; *Grant* v. *Moser*, 5 Man. & G. 123; S. C., 6 Scott, N. R. 46; *Price* v. *Seeley*, 10 Cl. & Fin. 28; *Baynes* v.

Brewster, 2 Q. B. 375; 1 Gale & D. 669; *Stammers* v. *Yearsley*, 3 M. & S. 410; S. C., 10 Bing. 35.

An officer may arrest and detain a drunken man who is publicly disturbing a worshiping congregation, if he is only detained long enough for him to become sufficiently sober to be taken before a magistrate for examination. *Hutchinson* v. *Sangster*, 4 G. Greene, 340.

Officers who arrest and restrain a person under a village ordinance, which is void because unauthorized by the charter, are liable therefor in an action for false imprisonment. *Barling* v. *West*, 29 Wis. 307; 9 Am. Rep. 576. Although constables and police officers may, in many cases, arrest upon their own view of an offense committed, yet they cannot arrest for placing a nuisance in a highway, if such act is not specified in the police law. *Danovan* v. *Jones*, 36 N. H. 246. A violation of a municipal ordinance is not necessarily a felony or a misdemeanor, and will not justify the imprisonment over night of a person charged therewith; but he should be taken immediately before a magistrate. *Schmeider* v. *McLane*, 4 Abb. Ct. App. 154; 4 Keyes 568; 36 Barb. 495. See, also, *Low* v. *Evans*, 16 Ind. 486.

If a person arrest one suspected of stealing, he is not liable for a false imprisonment, provided the person so taken is found guilty. *Wrexford* v. *Smith*, 2 Root (Conn.), 171.

And it is held, that a private person may justify an arrest for a felony by a mere preponderance of evidence that the accused had been guilty of a felony. And he may justify firing a gun upon the accused, by evidence that that mode of making the arrest was necessary. *Lander* v. *Miles*, 3 Oreg. 35. See *ante*, 314, § 9; *Livingston* v. *Burroughs*, 33 Mich. 511.

§ 4. **Military order.** See *ante*, art. 1, § 7. In an action for a false arrest and imprisonment, the fact that the acts complained, were committed by the defendant under the authority and while in the service of the so-called Confederate States, is no defense. *Caperton* v. *Martin*, 4 W. Va. 138; 6 Am. Rep. 270; *Same* v. *Ballard*, id. 420. See, also, *Nadenbousch* v. *Sharer*, 4 id. 203. But in an action for a malicious imprisonment in having called Confederate soldiers in making an unlawful arrest, it was held, that evidence was admissible to show that the defendants went to the place of arrest merely with intent to dissuade the soldiers from committing certain threatened depredations. *Girdner* v. *Taylor*, 6 Heisk. (Tenn.) 244.

§ 5. **Order of legislative body.** Either house of a legislative body, as the English parliament, the United States congress, or a State legislature, has power to order the attendance of witnesses, and in case of disobedience, to bring them in custody to the bar for the purpose of

examination. And if there be a charge of contempt and breach of privilege, and willful disobedience of an order on the part of the person charged to attend and answer it, the house has the power to cause the person charged to be taken into custody and to be brought to the bar to answer the charge. *Gossett* v. *Howard*, 10 Q. B. 359, 451; *Burdett* v. *Abbott*, 5 Dow. 165; *Wilckens* v. *Willett*, 1 Keyes (N. Y.), 521; S. C., 4 Abb. Ct. App. 596. And a valid warrant of arrest issued in such case, by the speaker of the house, is a sufficient justification to the officer serving it. Id.

§ 6. **Order of court.** Where the defendant seeks to justify the imprisonment under an order of the court, and undertakes to set out the facts in his plea, he must state all the facts necessary to give the court jurisdiction. *Von Kettler* v. *Johnson*, 57 Ill. 109. And see *Van Sandau* v. *Turner*, 6 Q. B. 773; S. C., 9 Jur. 296.

§ 7. **Miscellaneous.** In an action for an assault and false imprisonment, it is no justification that the plaintiff, being engaged in an affray, was taken into custody, until he could be brought before a justice, without stating that the defendant was an officer, or acted under a warrant. *Phillips* v. *Trull*, 11 Johns. 486.

One who procures the arrest and imprisonment of another, upon void process, is liable in an action for a false imprisonment; and mere good faith in making the affidavit, by virtue of which the arrest is made, is no defense. *Painter* v. *Ives*, 4 Neb. 122.

Advice from counsel to client, under and by virtue of which an alleged false imprisonment took place, will not, though followed in good faith, be a justification. *Josselyn* v. *McAllister*, 22 Mich. 300. But the inexperience of the attorney who advised and instituted the proceedings, while it cannot justify the arrest, may properly be shown in mitigation. *Mortimer* v. *Thomas*, 23 La. Ann. 165.

A declaration in an action for a false imprisonment, averring that the imprisonment of the plaintiff had been effected by means of threats and violence, and was without any reasonable or probable cause, contains a sufficient averment of malice to permit proof of it, and to justify a recovery for an aggravation of damages on that ground. *Brushaber* v. *Stegemann*, 22 Mich. 266.

Evidence of threats made to an officer by a brother of the plaintiff in an action for a false imprisonment, after the arrest, was held admissible for the purpose of justifying the officer in putting the plaintiff in irons. *Cochran* v. *Toher*, 14 Minn. 385. And see *Fulton* v. *Staats*, 41 N. Y. (2 Hand) 498; *McCall* v. *McDowell*, 1 Abb. (U. S.) 212.

§ 8. **Waiver of right of action.** The right of action for a false imprisonment may be lost by a waiver thereof. Thus, where the action

was for the arrest of the plaintiff on an execution erroneously issued, and it appeared that the plaintiff, instead of being discharged from execution by the defendant, duly obtained, after a three months' confinement, his liberation under the act for the relief of debtors, it was held, that he must thereby be considered as having waived the error, and affirmed the execution. *Reynolds* v. *Church*, 3 Caines, 274. See *Fuller* v. *Bowker*, 11 Mich. 204. So, where the defendants, on being arrested under a judge's order, offered bail to the plaintiff's attorneys, and induced the latter to examine and accept the bail, and to approve the undertaking, by which means the defendants procured their discharge from custody,—this was held to be an act on the part of the defendants, amounting to a waiver of any objection to their having been held to bail. *Dale* v. *Radcliffe*, 25 Barb. 333. A party may likewise enter into an agreement not to bring an action for a false imprisonment; and such an agreement, founded upon a good consideration, would be binding. See *Wentworth* v. *Bullen*, 9 B. & C. 840.

CHAPTER LXVI.

FENCES.

ARTICLE I.

OF FENCES IN GENERAL.

Section 1. Definition and nature. A fence is "a building or erection between two contiguous estates, so as to divide them; or, on the same estate, so as to divide one part from another." 1 Bouv. Dict. 579. Another view of fences in law is, to regard them as guards against intrusion; and by a late writer, a fence is defined to be "a line of obstacle interposed between two portions of land, for the purpose of preventing cattle or other domestic animals from going astray, or for protecting a field or property from unlawful encroachment." Tyler on Bound. 341. Fences are not only indispensable to the enjoyment of real estate, but they are, in their nature, real estate, to the same extent that houses and other structures on the land are so. *Murray* v. *Van Derlyn*, 24 Wis. 67. A fence, therefore, belonging to the owner of the land, will pass by his deed of the land without being expressed or designated as part of the thing granted. *Mott* v. *Palmer*, 1 N. Y. (1 Comst.) 564; *Goodrich* v. *Jones*, 2 Hill (N. Y.), 142. And see *Brown* v. *Bridges*, 31 Iowa, 138.

The erection and repair of boundary and division fences is generally regulated by local laws; and there is no doubt as to the authority of the legislatures of the several States to enact laws regulating the erection and repair of such fences, whatever opinion may be entertained as to the constitutional right to require the maintenance of fences along public highways. See *Wills* v. *Walters*, 5 Bush (Ky.), 351; *Coster* v. *Tide Water Co.*, 18 N. J. Eq. 54; *Warren* v. *Sabin*, 1 Lans. (N. Y.) 79; *post*, 331, § 3.

§ 2. **Common-law rights and duties.** By the common law no man was bound to fence against the cattle of others, unless by force of prescription. He was, however, bound, at his peril, to keep his cattle on his own grounds; "for every man's land is, in the eye of the law, inclosed and set apart from his neighbor's; and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal, invisible boundary, existing only in the contemplation of

law, as when one man's land adjoins to another's in the same field." 3 Bl. Com. 209; 2 Broom & Had. Com. 217, Wait's ed. If, therefore, the owner of cattle neglected to confine them to his own land, he was not only precluded from recovering damages for any injury they might sustain by going upon the lands of others (*Bethea* v. *Taylor*, 3 Stew. [Ala.] 482); but he was himself liable to make compensation for the trespass committed by his cattle. Id.; *Clark* v. *Brown*, 18 Wend. 213, 221; *Rust* v. *Low*, 6 Mass. 94; Vol. 1, 308. This doctrine of the common law of England has been recognized as the common law of Maine. *Harlow* v. *Stinson*, 60 Me. 347; Massachusetts, *Lyon* v. *Merrick*, 105 Mass. 71; New Hampshire, *Avery* v. *Maxwell*, 4 N. H. 36; Vermont, *Holden* v. *Shattuck*, 34 Vt. 336; New York, *Wells* v. *Howell*, 19 Johns. 385; *Bush* v. *Brainard*, 1 Cow. 78; New Jersey, *Coxe* v. *Robbins*, 4 Halst. 384; Delaware, *Vandergrift* v. *Del. R. R. Co.*, 2 Houst. (Del.) 297; Maryland, *Richardson* v. *Milburn*, 11 Md. 340; Kentucky, *Louisville, etc., R. R. Co.* v. *Ballard*, 2 Metc. (Ky.) 177; Minnesota, *Locke* v. *St. Paul, etc., R. R. Co.*, 15 Minn. 350; Indiana, *Brady* v. *Ball*, 14 Ind. 317; and Michigan, *Johnson* v. *Wing*, 3 Mich. 163. In Ohio, *Cleveland, etc., R. R. Co.* v. *Elliott*, 4 Ohio St. 474; California, *Comerford* v. *Dupuy*, 17 Cal. 308; North and South Carolina, *Laws* v. *North Carolina R. R. Co.*, 7 Jones (N. C.), 468; *Murray* v. *South Carolina R. R. Co.*, 10 Rich. (S. C.) 227; Georgia, *Macon, etc., R. R. Co.* v. *Baber*, 42 Ga. 305; Texas, *Walker* v. *Herron*, 22 Tex. 55; Missouri, *Crafton* v. *Hannibal, etc., R. R. Co.*, 55 Mo. 580; and in Mississippi, *Vicksburg, etc., R. R. Co.* v. *Patten*, 31 Miss. 156, the rule of the common law has never been in force, and the owner of animals is under no obligation to fence them in, while the occupant of land must, at his own peril, fence them out. In Pennsylvania, *North Pennsylvania R. R. Co.* v. *Rehman*, 49 Penn. St. 101; Iowa, *Wagner* v. *Bissell*, 3 Iowa, 396; and Illinois, *Stoner* v. *Shugart*, 45 Ill. 76, no one is bound either to fence in or fence out animals. In those States, the owners of cattle are not liable to be sued for trespass on account of their roaming on uninclosed wood or waste lands. But to permit such roaming is hardly a right; it is a privilege, or immunity, rather, growing out of the inappreciable damage that would be done. *Knight* v. *Abert*, 6 Penn. St. 472. The maxim *de minimis* in this particular controls, to avoid vexatious suits. Id. And see *Railroad Company* v. *Skinner*, 19 Penn. St. 298. And if an animal roaming at large breaks through a sufficient fence, the owner is, of course, liable for its trespass as at common law (*McManus* v. *Finan*, 4 Iowa, 283; *Rice* v. *Nagle*, 14 Kan. 499); and he can recover nothing for an injury sustained by the animal in consequence of such

breach. *Morrison* v. *Cornelius*, 63 N. C. 346; Vol. 1, 317. The owner of uninclosed land in any of the States above mentioned may drive off trespassing cattle into the highway, without injuring them, and is not responsible for an injury they may subsequently sustain without his default. *Palmer* v. *Silverthorn*, 32 Penn. St. 65. See *ante*, Vol. 1, 321, 322, title *Animals*.

§ 3. **Highway fences.** At common law, the recognized object and design of fencing is, not to keep the cattle of others off the premises, but to keep at home the cattle of the occupant. And it is held, that this principle has equal application to the owners of land adjoining public highways. *Hurd* v. *Rutland, etc., R. R. Co.*, 25 Vt. 116. In a later Vermont case it was said, that "under our more recent statutes, the law now is in this State, as it ever has been in England and other of the American States, that the owner of land is under no obligation to fence his land along the highway. The obligation in this respect results only from his duty to restrain his own cattle from trespassing upon his neighbor." BARRET, J., in *Holden* v. *Shattuck*, 34 Vt. 336, 343. And see *Chambers* v. *Matthews*, 18 N. J. Law, 368.

§ 4. **Railway fences.** The rule of the common law applies as well to a railway company, as to any other proprietor of land; and where no statutes exist, and no obligation is imposed by covenant or prescription, a railway company is no more bound to fence their land than an individual. *Dean* v. *Sullivan Railway*, 2 Fost. (N. H.) 316; *New York & Erie Railway Co.* v. *Skinner*, 19 Penn. St. 298; *Hurd* v. *Rutland, etc., R. R. Co.*, 25 Vt. 116; *Northeastern R. R. Co.* v. *Sineath*, 8 Rich. (S. C.) 185; *Williams* v. *Mich. Cent. R. R. Co.*, 2 Mich. 259; *Clark* v. *Syracuse, etc., R. R. Co.*, 11 Barb. 112; *Vandergrift* v. *Delaware R. R. Co.*, 2 Houst. (Del.) 297. And if cattle are suffered to run at large, and are injured or killed on the track of a railroad, without wantonness, or such gross negligence as might amount to the same thing, the owner has no recourse against the company or its servants. *Railroad Company* v. *Skinner*, 19 Penn. St. 298; *Housatonic R. R. Co.* v. *Knowles*, 30 Conn. 313; *Galpin* v. *Chicago, etc., R. R. Co.*, 19 Wis. 604; *Brown* v. *Hannibal, etc., R. R. Co.*, 33 Mo. 309; *Richmond* v. *Sacramento Valley R. R. Co.*, 18 Cal. 351. The reason of the rule, that railway companies are not obliged to fence between themselves and adjoining landholders, is sometimes said to be, that the expense of building and maintaining fences is allowed to the adjacent owner as part of the compensation which he receives for the land taken. *Stucke* v. *Mil. & Miss. R. R. Co.*, 9 Wis. 202; *Baltimore, etc., R. R.* v. *Lamborn*, 12 Md. 257.

This matter has, however, been made the subject of statutory regu-

lation, and it will be found that, as a general rule, railroad companies are now required by statute to fence their tracks, both in England and in this country. See *post*, title *Railroads*.

§ 5. **Division or partition fences.** At common law, no one is bound to maintain a fence between his own land and the land adjoining, except by agreement or prescription. *Churchill* v. *Evans*, 1 Taunt. 529. And see *ante*, 329, § 2. The division must be such as to impose upon the plaintiff an obligation to build and maintain a legal fence, upon a certain well-defined portion of the line. *Knox* v. *Tucker*, 48 Me. 373. To sustain the defense that the cattle were lawfully on the adjoining close, and escaped therefrom in consequence of the plaintiff's neglect to maintain his part of the partition fence, it must appear that there has been a division of the fence, either by the fence viewers, by a valid agreement between adjoining owners, or by prescription. Id. And, if it is claimed that the trespassing cattle passed over a defective fence which the plaintiff was bound to keep in repair, the burden of proof is on the defendant to show such liability, and that the cattle passed over that part of the fence. *Deyo* v. *Stewart*, 4 Denio, 101. If the animals doing damage in such case be breachy or unruly, the party damaged, in order to recover therefor, must show that the defect in his part of the fence was not the proximate cause of the damage. *Phelps* v. *Cousins*, 29 Ohio St. 135; *Heath* v. *Coltenback*, 5 Iowa, 490. The erection and maintenance of division or partition fences is, for the most part, regulated by statute; and most of the questions which have arisen in this country upon the subject have had their origin under statutes enacted in the different States. Some of these statutory provisions will be noticed in a subsequent section. See *post*, 334, § 7.

§ 6. **Prescriptive right or duty to fence.** There is no doubt that an obligation to maintain a partition fence may exist by prescription. See *Starr* v. *Rokesby*, 1 Salk. 335; *Boyle* v. *Tamlyn*, 6 Barn. & C. 329; *Walker* v. *Chichester*, 2 Brev. (S. C.) 67; *Moore* v. *Levert*, 24 Ala. 310; *Richardson* v. *Millburn*, 11 Md. 340; *Bronson* v. *Coffin*, 108 Mass. 185. And a prescription to fence is allowed at common law, as resulting from an original grant or agreement, the evidence of which is lost by lapse of time. *Rust* v. *Low*, 6 Mass. 97. And see *Binney* v. *Hull*, 5 Pick. 503; *Adams* v. *Van Alstyne*, 35 Barb. 9; S. C. affirmed, 25 N. Y. (11 Smith) 232. Or the obligation by prescription may arise, where the fence between two closes has time out of mind been repaired by the tenant of one of them. Viner's Abr., Fences, E., pp. 164, 166; 2 Dane's Abr. 660. And see *Lawrence* v. *Jenkins*, L. R., 8 Q. B. 274; S. C., 5 Eng. R. 228. If the adjoining owners of land

recognize and use a fence as a partition fence, it is a partition fence within the meaning of this statute, and the parties and their privies are subject to the law regulating partition fences, although the fence may not be on the dividing lines, as, for instance, where it is partly on the line of both, and is joined in the middle. *Stallcup* v. *Bradly*, 3 Cold. 406.

In replevin for the plaintiff's oxen, which escaped from his land to the adjoining land of the defendant, and by the latter taken up and impounded, the jury were instructed that if they should find that the owners of the adjacent lands, or their grantors or persons from whom they respectively derived title, severally maintained and supported well-defined and specific portions of the line fence for twenty consecutive years, each repairing his own part, recognizing his obligation to do so, it would be a division of such fence by prescription. And thereafter, it would be obligatory upon such owners to keep in repair such portions as they had so severally maintained for twenty years; and that if the jury find that the cattle escaped from the plaintiff's close to the adjoining close of the defendant, over that part of the line fence which the defendant, under the foregoing rule, had become liable to keep in repair, which was out of repair, then the restraining and impounding of the cattle by the defendant was unlawful. The instruction was held to be unexceptionable. *Harlow* v. *Stinson*, 60 Me. 347.

The common law as to prescription has not been altered by the statutes relating to fences in Maine (id.); nor in Massachusetts. *Thayer* v. *Arnold*, 4 Metc. 589.

At common law, a party entitled by prescription to the benefit of the fence might, by means of a writ *de curia claudenda*, have compelled the adjoining owner to repair it, and have recovered damages as well for the non-repair; and a plea in an action of trespass for injury done by cattle, that the plaintiff is bound by prescription to fence against the defendant's cattle is a good plea (*Nowel* v. *Smith*, Cro. Eliz. 709), the party bound by prescription being answerable to the owner, for whose benefit the fence is to be maintained, for all damages reasonably attributable to its defective condition. Id.; *Lawrence* v. *Jenkins*, L. R., 8 Q. B. 274; S. C., 5 Eng. R. 228. And see *Rooth* v. *Wilson*, 1 B. & Ald. 59; *Powell* v. *Salisbury*, 2 Y. & J. 391. But when bound by prescription to fence his close, the owner was not required to do this against any cattle but those which were *rightfully* in the adjoining close. *Rust* v. *Low*, 6 Mass. 90.

§ 8. **Agreements as to fences.** Parties may also obligate themselves by contract to maintain boundary and division fences; and such a contract, once entered into, is irrevocable, except by mutual consent, or

in some way provided by statute, as for instance, by calling on the fence-viewers, where jurisdiction is not precluded by a mere oral agreement. *York* v. *Davis*, 11 N. H. 241. The person upon whom the duty of maintaining a fence is devolved by contract has no right to complain of injuries to his own animals (*Cincinnati, etc., R. R. Co.* v. *Waterson*, 4 Ohio St. 424); nor of injuries sustained by the entry of the animals of others upon his land (*York* v. *Davis*, 11 N. H. 241), by reason of a deficient fence. See *Carruthers* v. *Hollis*, 8 Ad. & Ell. 113; *Phelps* v. *Cousins*, 29 Ohio St. 135. And if animals stray upon land through a defective fence, or by reason of the want of a fence, which he has obligated himself to build, he is liable as a trespasser. See *Cincinnati, etc., R. R. Co.* v. *Waterson*, 4 Ohio St. 424; *Lee* v. *Riley*, 18 C. B. (N. S.) 722.

Covenants to erect and keep in repair division fences have been deemed covenants running with the land, and binding the assigns of the covenantor. *Kellogg* v. *Robinson*, 6 Vt. 276; *Blain* v. *Taylor*, 19 Abb. Pr. (N. Y.) 228; *Duffy* v. *New York & Harlem R. R. Co.*, 2 Hilt. (N. Y.) 496; *Bronson* v. *Coffin*, 108 Mass. 175, 186; *Western* v. *Macdermott*, L. R., 2 Ch. App. 72; S. C., L. R., 1 Eq. 499; Vol. 2, 395. And a positive opinion was expressed that, in a deed to a railway company of a right of way over land of the grantor on which its track had been laid out, a covenant that the grantor, his heirs and assigns, would build and forever keep up a fence on each side thereof, through the grantor's land, was a covenant running with the land; and it was held, that an assignee of that land was so far bound thereby that he could derive no advantage from its breach. *Easter* v. *Little Miami R. R. Co.*, 14 Ohio St. 48. And see *Blain* v. *Taylor*, 19 Abb. Pr. (N. Y.) 228.

§ 7. **Statutes relating to division fences.** See *ante*, 332, § 5. In the well-considered case of *Rust* v. *Low*, 6 Mass. 90, the following principles appear to be recognized and established:

1. At common law, the tenant of a close was not obliged to fence against an adjoining close, unless by force of prescription.

2. When a man was obliged by prescription to fence his close, he was not obliged to fence against any cattle but those which were *rightfully* in the adjoining close.

3. A man, though not bound to fence against an adjoining close, was still bound at his peril to keep his cattle on his own close, and prevent them from escaping.

4. The legal obligation of the tenants of adjoining lands to make and maintain partition fences, where no prescription exists, and no written agreement has been made, *rest on the statute.*

5. An assignment, pursuant to the statute, imposes the same duty as would result from a prescription.

6. Where there is no prescription or agreement, the provisions of the statute oblige a tenant, liable to make the partition fence, or any part of it, to fence only as in the case of prescription at common law; that is, against such cattle as are *rightfully* on the adjoining land.

7. Every person may maintain trespass against the owner of cattle, which trespass upon his land, unless such owner can protect himself by the provisions of the statute, or by a written agreement, or by prescription. *Little* v. *Lathrop*, 5 Me. 356; *Lyons* v. *Merrick*, 105 Mass. 71. The general doctrines as above stated have been frequently affirmed, both in the State of Maine and elsewhere. See *Lord* v. *Wormwood*, 29 Me. 282; *Lawrence* v. *Combs*, 31 N. H. 331; *Lyman* v. *Gipson*, 18 Pick. 422; *Coxe* v. *Robbins*, 4 Halst. (N. J.) 384; *North Penn. R. R. Co.* v. *Rehman*, 49 Penn. St. 101; *Holladay* v. *Marsh*, 3 Wend. 142.

In some of the States the owner of land is required by statute, to fence it, and he is deprived of all right to complain of trespasses by animals committed by reason of the want of a fence. See *Studwell* v. *Ritch*, 14 Conn. 292; *Hine* v. *Wooding*, 37 Conn. 123; *Van Leuven* v. *Lyke*, 1 N. Y. (1 Comst.) 515, 517. But a statute of this kind is to be construed as having reference to domestic animals properly restrainable by fences, as horses, cattle, sheep, etc., and not to animals not restrained or kept within bounds by common fences. As to them the principle of the common law remains in force, and their owner must keep them at his peril. Thus, it was held in Missouri, that where a buffalo bull, a wild, vicious, and mischievous animal, breaks into a close, the owner of such close may kill him if this be necessary to preserve his property from destruction, although the close may not be fenced in the manner required by the act regulating inclosures. *Canefox* v. *Crenshaw*, 24 Mo. 199. See *ante*, Vol. 1, 320, 321, *Animals*. The statute generally provides, that, when two or more persons shall have lands adjoining, each of them shall make and maintain a just proportion of the division fence between them, except where the owner of either of the adjoining lands shall choose to let such land lie open. See *Holladay* v. *Marsh*, 3 Wend. 142; *Carpenter* v. *Halsey*, 60 Barb. 45; S. C. affirmed, 57 N. Y. (12 Sick.) 657. The statute does not usually prescribe the kind of fence that shall be made. The words of the Indiana statute are, "any structure, or hedge, or ditch, in the nature of a fence, used for purposes of inclosure, which is such as good husbandmen keep, and as shall, on the testimony of skillful men, appear to be sufficient, shall be deemed a lawful fence." See *Myers* v. *Dodd*, 9 Ind. 290. It

was held in New York that a zigzag, or Virginia fence, is not a proper fence, where it projects over the lines of a lane which was to be left of a specified width. *Herrick* v. *Stover*, 5 Wend. 580. But in a later case in the same State, it was observed that this kind of a fence has been built as a division fence, *time out of mind*, and that it has become a part of the common law of the State that adjoining owners of farms may erect such fences as division fences, occupying the necessary quantity of land upon each side of the mathematical line, and that such fence is a fence, in contemplation of law, upon the line between the adjoining farms, and is a fence "on the side of" the farm. *Ferris* v. *Van Buskirk*, 18 Barb. 397; *Pettigrew* v. *Lancy*, 48 Mo. 380. A Virginia or worm fence, or the ordinary rail fence, is a legal fence, and one-half of it is properly placed upon each land owner. Id. No one but the adjoining owner or possessor has any interest in the duty or obligation of another to build or maintain a division fence; and the omission to do so, though the want of the fence results in injury to a third person, gives him no ground of action. *Ryan* v. *Rochester, etc., R. R. Co.*, 9 How. (N. Y.) 453; *Bronk* v. *Becker*, 17 Wend. 320; *Ricketts* v. *East and West India Docks, etc., Co.*, 12 C. B. 160. And see *Cook* v. *Morea*, 33 Ind. 497.

Where two persons own lands adjoining, and there is a division fence between them, one portion of which one of the parties is bound to repair, and the other portion the other party is bound in like manner to keep in repair, and the cattle of one of them escape from his field, through the division fence, into the field of the other, by reason of the defect or insufficiency of that portion of the division fence which the latter is bound to keep in repair, he is without remedy; though he may recover for thei breach through any other place. *Shepherd* v. *Hees*, 12 Johns. 433; *Cowles* v. *Balzer*, 47 Barb. 562; *Saxton* v. *Bacon*, 31 Vt. 540; *Tupper* v. *Clark*, 43 id. 200; *Wills* v. *Walters*, 5 Bush (Ky.), 351. And see *Jones* v. *Sheldon*, 50 N. Y. (5 Sick.) 477. If no particular portion of the fence has been assigned to the charge of any of the adjoining owners, it is held in Maine and Connecticut that none of them can recover for such breaches of cattle. *Gooch* v. *Stephenson*, 13 Me. 371; *Studwell* v. *Ritch*, 14 Conn. 292. But in some of the States it is held that any of them may recover; their neglect to procure a division of the fence being deemed an election to occupy and improve their lands under the rules of the common law, and subject to the common-law responsibilities. *Johnson* v. *Wing*, 3 Mich. 163; *Thayer* v. *Arnold*, 4 Metc. (Mass.) 589; *Coxe* v. *Robbins*, 4 Halst. (N. J.) 384; *Tewksbury* v. *Bucklin*, 7 N. H. 518.

Where the plaintiff and the defendant occupied adjoining lands, and

the former removed a portion of the line fence between them, and notified the defendant that he had done so, and to remove his cattle, which the latter did not do, but shortly afterward removed the remainder of the fence, it was held that the defendant was liable for damage done to the plaintiff's field by the cattle, after the entire fence between them had been removed. *Van Slyck* v. *Snell*, 6 Lans. (N. Y.) 299.

The effect of the Kansas law relating to inclosures is, that before a person can recover for injuries done to his crops by roving stock, he must protect such crops by a lawful fence. Failing to have such a fence, he is deemed by the law to be so negligent of his property that he cannot recover damages for a trespass thereon occasioned by reason of the defective fence. The object of the law is to permit stock to run at large on the prairie and relieve the owners from an action for damages should they wander upon the land of another, unprotected by a lawful fence. *Larkin* v. *Taylor*, 5 Kans. 433. See *Rice* v. *Nagle*, 14 id. 498; *Wagner* v. *Bissell*, 3 Iowa, 396.

If an existing fence is a partition fence by agreement, by acquiescence, or under the statute, it cannot be removed by either owner or occupier until the other has had sufficient notice. *McCormick* v. *Tate*, 20 Ill. 334; *Richardson* v. *M'Dougall*, 11 Wend. 46. And see *post*, 341, § 14.

§ 9. **Ownership of fences.** One who desires to inclose his land must, in the absence of any agreement, statute, or prescription, erect his fence on his own premises. The English rule as to ditching applies. This rule is, that "no man making a ditch can cut into his neighbor's soil, but usually he cuts it to the very extremity of his own land; he is, of course, bound to throw the soil which he digs out upon his own land, and often, if he likes, he plants a hedge on the top of it; therefore, if he afterward cuts beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbor's land, and is a trespasser. No rule about four feet, and eight feet, has any thing to do with it. He may cut the ditch as much wider as he will, if he enlarges it into his own land." LAWRENCE, J., in *Vowles* v. *Miller*, 3 Taunt. 138. The land which constitutes the ditch, in point of law, is part of the close, though it be on the outside of the bank. *Doe* v. *Pearsey*, 7 Barn. & C. 307. And if something further is done for the party's own convenience, when that which constitutes the fence is dug out from his land, as, for instance, if a small portion of uninclosed land near a public or private way is left out of the inclosure to protect and secure the occupation of that part of the land which is inclosed, that, in point of law, is a part of the close on which the inclosure is made. Id.

Therefore, if two estates be separated by a hedge and single ditch,

prima facie, both ditch and hedge belong to the owner of the land on which the hedge is planted. *Vowles* v. *Miller*, 3 Taunt. 138. If there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership. *Guy* v. *West*, 2 Selw. N. P. 1244. And see *Marner* v. *Southworth*, 6 Conn. 471; *Searby* v. *Tottenham Railway Co.*, L. R., 5 Eq. 409. And if the proprietors on each side of the boundary can prove acts of ownership, this would be evidence of a tenancy in common in the hedge, ditch, or bank. Id.; *Voyce* v. *Voyce*, Gow. 201. See *Walker* v. *Matrous*, 8 Ala. 493.

Where two adjoinining proprietors built a partition fence with an agreement that each one should have the portion of the fence he should make, and one of the proprietors built his fence over the line and on the land of the other, who sold his tract to a purchaser who had no notice of such agreement, it was held that such purchaser was entitled to the fence. *Climer* v. *Wallace*, 28 Mo. 556.

§ 10. **Right to build, and where and how.** An occupant of land, who is bound to maintain a fence between his own and an adjoining inclosure, may place half of a fence, of reasonable dimensions, on the land of the adjoining owner (*Pettigrew* v. *Lancy*, 48 Mo. 380); and he may cut half of a ditch on the land of such owner, when a ditch is proper for a partition fence. *Newell* v. *Hill*, 2 Metc. (Mass.) 180; *Warren* v. *Sabin*, 1 Lans. (N. Y.) 79. And see *Ferris* v. *Van Buskirk*, 18 Barb. 397. But if it is not a division fence, a party cannot set the posts partly on the lands of an adjoining owner. *Sharp* v. *Curtiss*, 15 Conn. 532; *Warren* v. *Sabin*, 1 Lans. (N. Y.) 79. The general rule, that a party who is the owner of personal property which is upon the land of another, cannot, therefore, enter to take it away, does not apply to an entry necessary to enable a person to make his part of a fence. As the law requires each owner to make his portion of the fence, this duty carries with it the right to such necessary occupation for the time being as is required to enable him to comply. *Carpenter* v. *Halsey*, 60 Barb. 45; S. C. affirmed, 57 N.Y. (12 Sick.) 657.

It would seem, from the cases cited in the preceding section, that, in England, the party who makes a fence between his close and that of an adjoining tenant, must make it wholly on his own land. And see 1 Chit. Gen. Pract. 193, 194; Gale & What. Easm. 296, *et seq.* If a person builds a fence beyond his line, upon the lands of another, the latter may lawfully remove such fence. *Thayer* v. *Wright*, 4 Denio, 180.

The statute of Maine, requiring partition fences to be divided in equal halves, does not require that the portion assigned to each should

be contiguous. *Prescott* v. *Mudgett*, 13 Me. 423. So, it is not one-half in length of a division fence which the statute of New York requires each owner of adjoining lands to build, but a just and equal proportion with reference to the cost of construction and maintenance. *Foote* v. *Dewey*, 3 N. Y. Sup. (T. & C.) 638; S. C., 1 Hun, 529.

In Pennsylvania, an occupant is not bound to join in a division fence. He may set his fence, if it please him, not on the line of division, but within it; and if his neighbor extend his fence across the line to join it, it is a trespass. *Smith* v. *Johnson*, 76 Penn. St. 191. But if the one party set his fence on the very line, the other may not only join a panel of his fence to it, but may insert the rails into it so as to extend a few inches beyond it; for when the charge assessed by the fence viewers is answered, it becomes common property, and the use of it beyond the strict bounds of the license falls within the bounds of the maxim *de minimis*. *Dysart* v. *Leeds*, 2 Penn. St. 488. See *Painter* v. *Reece*, id. 126; *Palmer* v. *Silverthorn*, 32 id. 65. An agreement between adjoining owners to maintain each a specified part of a division fence, is a contract intended to define and regulate the relation of the adjoining owners, and cannot survive that relation, so as to bind persons not similarly situated. *Bland* v. *Umstead*, 23 Penn. St. 316.

Where a private way between the premises of adjacent land-owners is necessary to afford one of them ingress and egress to and from his residence, he cannot be compelled to maintain the fence on his own side of such private way and half of that on the other side. *Bland* v. *Hixenbaugh*, 39 Iowa, 532.

§ 11. **Obligation to repair.** The obligation to repair a fence may be imposed by agreement, it may arise by prescription, or, more frequently, the subject is regulated by statute. But it is the occupier, and not the owner of a close, who is bound to keep the fences in repair (*Tewksbury* v. *Bucklin*, 7 N. H. 518; *Moore* v. *Levert*, 24 Ala. 310); and an action for not repairing, whereby another party is damnified, can only be maintained against the former. *Cheetham* v. *Hampson*, 4 Term R. 318. The obligation to repair carries with it the right to such necessary occupation of the land of another, for the time being, as is required to comply with such legal duty. See *Carpenter* v. *Halsey*, 60 Barb. 45; S. C. affirmed, 57 N. Y. (12 Sick.) 657; *Henry* v. *Jones*, 28 Ala. 385; *ante*, 338, § 10.

An agreement authorizing a party wall to be "raised and continued in a straight line with the present divisional wall," does not give any permission or privilege, either to pull down such party wall or to diminish the area of the adjoining building. *Baugher* v. *Wilkins*, 16 Md. 35.

No one is bound to keep up fences between adjoining closes of which he is owner; and even where adjoining lands, which have once belonged to different persons, one of whom was bound to repair the fences between the two, afterward become the property of the same person, the pre-existing obligation to repair the fences is destroyed by the unity of ownership. And where the person who has so become the owner of the entirety, afterward parts with one of the two closes, the obligation to repair the fences will not revive, unless express words be introduced into the deed of conveyance for that purpose. *Boyle* v. *Tamlyn*, 6 Barn. & C. 329, 337; *Polus* v. *Henstock*, 1 Vent. 97. See *Canham* v. *Fisk*, 2 Cr. & Jer. 126.

§ 12. **Expense of building.** Under the law of New York relative to fences, the owner of land need not inclose it, but may, if he choose, let it lie open. But if he afterward inclose it, he is required to refund to the owner of the adjoining land a just proportion of the value at that time of any division fence that shall have been made and maintained by such adjoining owner, or build his proportion of such division fence. 1 N. Y. Rev. Stat. (Edm. ed.) 326. And see *Cowles* v. *Balzer*, 47 Barb. 562. And before a party can claim that he has chosen to let his land "lie open to a public common," he must have given the adjoining owner, or the fence viewers, notice that he has so chosen; otherwise, he will be liable to the adjoining owner for the expense of building his proportion of the division fence. *Perkins* v. *Perkins*, 44 Barb. 134. The facts that he has never fenced his land, and has only used it for a sugar bush, and as a wood and timber lot, will not establish that he has elected to let the same "lie open to the public common." Id. The statute relative to division fences is for the benefit of occupants, without regard to the particular estate enjoyed; any one occupying land as *tenant at will* or *at sufferance* is, therefore, entitled to the benefit of the statute, and may maintain an action for the expense of repairing the portion of the adjoining owner. *Bronk* v. *Becker*, 17 Wend. 320.

Under the statute of Connecticut, where a division fence is found by the viewers to be insufficient, and the person bound to repair it neglects to do this for fifteen days after notice in writing from the fence viewers, the party aggrieved may repair it in any reasonable manner, and the expense may be allowed him by the fence viewers. *Fox* v. *Beebe*, 24 Conn. 271; *Edgerton* v. *Moore*, 28 id. 600.

It was held under a statute of Alabama, which provided that division fences should be deemed joint property, that one of the owners could not maintain an action of trespass against the other for an injury consequent upon an insufficient fence, even though they had entered into an agreement, one to keep up one-half of the fence, and the other the

other half. *Walker* v. *Watrous*, 8 Ala. 493. If the fence needs repairing in such case, and one of the proprietors refuses his aid in repairing it, the other may cause it to be done, and recover from the refusing party his share of the expense. Id. And see *Moore* v. *Levert*, 24 Ala. 310.

Under the statute of Indiana, both parties to a partition fence are equally bound to maintain it. Either may repair, and enforce contribution from the other; but failure to do so leaves them upon their respective common-law rights and obligations. *Myers* v. *Dodd*, 9 Ind. 290. And see *Cook* v. *Morea*, 33 id. 497.

A decision of fence-viewers in Wisconsin, requiring the occupant of uninclosed land to erect, maintain, or pay for part of a division fence, is void. The occupants of such lands are under no obligation to erect fences. *Bechtel* v. *Neilson*, 19 Wis. 49.

By the law of Pennsylvania, where there is only a line between the lands of different parties, each has a right to insist upon a common partition fence. But where neither party insists upon such a fence being made, it will be presumed that they mutually agree so to occupy their respective parts that it shall not be needed. If, however, one party insist upon the partition fence being made and makes his share of it, and the other, refusing to put up his part, is injured by the cattle of the other going upon his land in consequence of the fence not having been made, the injury being the result of his own negligence, he cannot maintain an action for the damage thereby sustained. *Rangler* v. *McCreight*, 27 Penn. St. 95. Where an owner of unimproved land, adjoining unimproved land of another person, builds a fence on the line, he cannot call on the latter for contribution. *Palmer* v. *Silverthorn*, 32 Penn. St. 65.

A few only of the statutory provisions in the different States relative to the expense of erecting and keeping fences in repair are above given, but they serve to indicate the general character of legislation on the subject in all the States. For particular information the statutes and decisions of the given State should be consulted.

§ 13. **Expenses for repairs.** See preceding section.

§ 14. **Right to remove.** We have already seen (*ante*, 329, § 1), that fences are deemed part of the freehold. The law has been thus stated: "If I build a fence upon my neighbor's land, it is his, not mine; and the dominion which every man has over his own property, gives him a right to remove it whenever he pleases. *Clowers* v. *Sawyer*, 1 Head, 156. If it be useful to me as well as to him, and if I build it in consideration of his promise that it should stand there forever, and he removes it in violation of that promise, I may recover in an action on the contract the value of my labor, and, perhaps, for the consequential in-

jury. On no principle known to the law can I maintain an action of trespass." BLACK, J., in *Dietrich* v. *Berk*, 24 Penn. St. 470, 472. But it is held, that when one of two conterminous proprietors erects a division fence, and, by mistake, places it on the other's land, he is entitled to remove it to the true line, within a reasonable time after discovering the mistake. *Matson* v. *Calhoun*, 44 Mo. 368. See *Clowers* v. *Sawyer*, 1 Head, 156. So, it is held, that if part of a division fence be assigned to one to keep it in repair, it is his property, so far at least that the removal of it, for lawful purposes, cannot make him a trespasser. *Burrell* v. *Burrell*, 11 Mass. 294.

In New York, no person is bound, either by statute or common law, to keep up a division fence always. If he wishes he may throw his land open, and remove his fences, upon giving sufficient notice. See *Holladay* v. *Marsh*, 3 Wend. 142. But if a person removes a division fence without having previously given the three months' notice required by statute, a party who may be injured thereby is not limited to a suit for the recovery of actual damages sustained in consequence of such removal; but may, after a month's notice, make the fence anew, and recover the expense thereof by action. *Richardson* v. *M'Dougall*, 11 Wend. 46. If actual damages are sustained, as the loss of a crop, for instance, by means of such removal, an action for the recovery of such damages may be also sustained. Id.

A person who has planted trees on his own side of a division fence,—the fence being set and the trees planted by the joint action and co-operation of the adjacent owner who was his grantor,—has a right as against the grantees of such neighboring owner, to remove the trees, whether such location and planting would or would not have created an estoppel as to the title to the land where they were planted. *Reed* v. *Drake*, 29 Mich. 222.

As to facts considered sufficient to justify a perpetual injunction against removal of a fence along a highway, see *Cattell* v. *Wilhelm*, 39 Iowa, 288.

§ 15. **Neglect to build and its consequences.** The consequences resulting from a failure to comply with the requirement of the law relative to the erection of fences, have been generally noticed in preceding sections. In further illustration of this branch of the subject it may be added, that a person opening a dangerous hole or ditch near a public way, is bound to fence it in, if it be sufficiently near the traveled way to render it probable that persons passing by may be injured. See *Stratton* v. *Staples*, 59 Me. 94; *Indermaur* v. *Dames*, L. R., 2 C. P. 311. But see *Binks* v. *South Yorkshire Railway Co.*, 3 B. & S. 244; *Bolch* v. *Smith*, 7 H. & N. 736; *Caulkins* v. *Mathews*, 5 Kans. 191;

Maltby v. *Dihel*, 5 id. 430. Nor is the owner of cattle exempted from liability for trespasses committed by them on the ground that it is impossible to errect a fence. The lands of A and B were divided only by an unnavigable stream, on the banks of which it was very difficult to keep a fence. A's land was pastured, and B's was cultivated. It was held that A was liable, if his cattle got across the stream into B's land, and injured his crops. *Bissel* v. *Southworth*, 1 Root (Conn.), 269.

Where the cattle of B, rightfully pasturing on A's land, break through and trespass on C's land, by reason of the insufficient fence, which A was bound to keep up, C may bring trespass against B. *Stafford* v. *Ingersol*, 3 Hill (N.Y.), 38; *Lyons* v. *Merrick*, 105 Mass. 71.

§ 16. **Neglect to repair and its consequences.** It is a general rule that where a person is under an obligation, either by agreement or prescription, to repair a fence for the benefit of his neighbor, he will be held liable for all the consequences arising from his neglect, if he fail to make the requisite repairs. Thus, where the plaintiff's horse escaped into the defendant's field, through defects in fences which the defendant was bound to repair, and was there killed by falling into a ditch, it was held that the defendant was liable for the consequences. *Anonymous*, 1 Vent. 264. So, the plaintiff declared in an action against the defendant for not repairing his fences, *per quod* the plaintiff's horses escaped into the defendant's close, and were there killed by the falling of a haystack, and it was held, that the damage was not too remote and that the action was maintainable. *Powell* v. *Salisbury*, 2 Y. & J. 391. See, also, *Lee* v. *Riley*, 18 C. B. (N. S.) 722. And where cattle have escaped from an adjoining close into that of the defendants', through defect of fences which he is bound to repair, he is not justified in driving them out into the highway, and leaving them there, even though it may be their best way back. *Carruthers* v. *Hollis*, 8 Ad. & El. 113; S. C., 3 N. & P. 246; Vol. 1, 322. If, however, one land-owner is bound to maintain and repair a fence for the benefit of the adjoining land-owner, and cattle escape out of the land of the latter, and trespass upon the land of the person who ought to have kept up the fence, it is no excuse that the fences were out of repair, if the beasts were trespassers in the place from whence they came. If such place be a close the owner of the cattle must show an interest or a right to put them there. If it be a way, he must show that he was lawfully using the way. *Dovaston* v. *Payne*, 2 H. Bl. 528; *Anonymous*, 3 Wils. 126; Add. on Torts, 267; *Stackpole* v. *Healy*, 16 Mass. 36. And see *Wells* v. *Howell*, 19 Johns. 385; *Singleton* v. *Williamson* 7 H. & N. 410; S. C., 31 L. J. Exch. 17; *ante*, 333, § 8.

§ 17. **Landlord and tenant as to fences.** The rights and duties as to

the erection and repair of fences upon demised premises are usually regulated by the terms of the lease. If the lease contain no agreement or covenant respecting the matter, the obligation to repair rests upon the actual occupant or the tenant. *Long* v. *Fitzimmons*, 1 Watts & Serg. 530. See *ante*, 339, § 11. And ordinarily, the action for an injury arising from fences being out of repair, should be brought against the occupier of the premises (Id.); unless the wrong causing the damage arise from the malfeasance or misfeasance of the landlord, in which case, he may be sued instead of the tenant. *Todd* v. *Flight*, 9 C. B. (N. S.) 377; *Payne* v. *Rogers*, 2 H. Bl. 350. See *Taylor* v. *Whitehead*, 2 Doug. 745.

A covenant, on the part of the lessees, in a lease, "to keep the buildings and fences in good repair, except natural wear and tear," has been held to bind them to rebuild in case of accidental destruction by fire or otherwise. *McIntosh* v. *Lown*, 49 Barb. 550. And see *Bullock* v. *Dommitt*, 6 Term R. 650; *ante*, Vol. 2, title *Covenants*.

The tenant of a land-owner who is bound by contract to maintain the fences along the track of a railway company, cannot recover against the company for an injury to his cattle occasioned by the failure of his landlord to maintain the fences. *Indianapolis, etc., R. R. Co.* v. *Petty*, 25 Ind. 413.

CHAPTER LXVII.

FERRIES.

ARTICLE I.

OF FERRIES GENERALLY.

Section 1. Definition and nature. A ferry is a liberty to have a boat for passage upon a river, for the transportation of men, horses, and carriages with their contents, for a reasonable toll. *State* v. *Wilson*, 42 Me. 9; *State* v. *Hudson County*, 3 Zabr. (N. J.) 206. The term is likewise employed to designate the place where such liberty is exercised. *Chapelle* v. *Wells*, 4 Mart. N. S. (La.) 426. By the common law, a ferryman is only he who has the exclusive right of transporting passengers over a river or water-course, for hire, at an established rate. *Clarke* v. *State*, 2 McCord (S. C.), 47. The franchise is established to secure convenient passage; and the exclusive right is given because in an unpopulous place there might not be profit sufficient to maintain the boat, if there was no monopoly. *Newton* v. *Cubitt*, 12 C. B. (N. S.) 32, 58. It does not appear that the right to keep a ferry, and to demand and receive toll, either in England or in this country, has at any time been incident or appendant to any estate in land. Id.; *Day* v. *Stetson*, 8 Me. 365; *Stark* v. *Miller*, 3 Mo. 470. It is a right to transport persons and carriages for hire, and, therefore, the property in the waters may be in one, and the right of ferry in another. *Fay, Petitioner, etc.*, 15 Pick. 243; *Mills* v. *County Commissioners*, 3 Scam. (Ill.) 53. Like a right of common or an advowson, it is a right *en gros*. *Haithcock* v. *Swift Island Manuf. Co.*, 72 N. C. 410. And a conveyance of land on one side of a river, "with all the appurtenances thereto belonging," does not convey the title to one-half of a ferry which is not annexed as of right appurtenant thereto. Id.; *Harrison* v. *Young*, 9 Ga. 359. Nor does a grant of the ferry confer a title to the soil. *Somerville* v. *Wimbish*, 7 Gratt. (Va.) 205.

It has been said, that "the same principle which compels us to call a bridge, or a river, a common highway, applies to a ferry, for it is a common passage, which is no more than a common highway." Woolrych on Ways, 217. And see *Pain* v. *Patrick*, 3 Mod. 294.

§ 2. **Franchise, how acquired.** The right to keep a ferry is, in England, an incorporeal hereditament, being a franchise granted by

the crown, or depending upon prescription, which supposes a grant. *Blisset* v. *Hart*, Willes, 508; *Trotter* v. *Harris*, 2 Y. & J. 285. And from long user a grant or legal origin may be presumed as against a wrong-doer. *Milton* v. *Haden*, 32 Ala. 30; *Harrison* v. *Young*, 9 Ga. 359. In this country ferries are established by legislative authority, which is exercised either directly or by a delegation of powers to courts, commissioners, or municipalities. *Mills* v. *St. Clair Co.*, 8 How. (U. S.) 581; *McRoberts* v. *Washburne*, 10 Minn. 23; *Stark* v. *Miller*, 3 Mo. 470; *Milton* v. *Haden*, 32 Ala. 30; *Prosser* v. *Wapello Co.*, 18 Iowa, 327; *Columbia, etc., Bridge Co.* v. *Geise*, 34 N. J. Law, 268; *Greer* v. *Haugabooker*, 47 Ga. 282. Such a franchise is the creature of sovereign power, and no one can exercise it without the consent of the State. *Bell* v. *Clegg*, 25 Ark. 26; *Prosser* v. *Wapello County*, 18 Iowa, 327; *Enfield Toll Bridge Co.* v. *Hartford and N. H. R. R. Co.*, 17 Conn. 64. And being a personal trust, the liability of the grantee cannot be removed by substitution. *Thomas* v. *Armstrong*, 7 Cal. 286; *Willard* v. *Forsythe*, 2 Mich. N. P. 190.

It has been held, that a State legislature, by right of eminent domain, has power to establish ferries wherever it is deemed necessary for the public easement, without regard to the ownership of the soil, on making just compensation. *Allen* v. *Farnsworth*, 5 Yerg. (Tenn.) 189; *Barrington* v. *Neuse River, etc., Co.*, 69 N. C. 165; *Mills* v. *County Commissioners*, 3 Scam. (Ill.) 53. And in the case of a boundary river between two States, either State may grant the exclusive right to ferry from its own shore. *Conway* v. *Taylor*, 1 Black (U. S.), 603; *Columbia D. B. Co.* v. *Geisse*, 38 N. J. Law, 39; *People* v. *Babcock*, 11 Wend. 586. See *Marshall* v. *Grimes*, 41 Miss. 27. But generally, by statute, the owner of the lands embracing the ferry landings, at the establishment of a ferry, is given the preference to a grant of license, if he make application therefor (see *Beckley* v. *Learn*, 3 Oreg. 470; *Same* v. *Same*, id. 544); though, without a statute provision, the owner is not, as a matter of right, and because he is owner, entitled to keep the ferry. *Nashville Bridge Co.* v. *Shelby*, 10 Yerg. (Tenn.) 280; *Trustees, etc.*, v. *Tatman*, 13 Ill. 27. See *Pipkin* v. *Wynns*, 2 Dev. (N. C.) 403. When the right to establish a ferry is limited by statute to the owners of the land fronting on the stream (see *Carter* v. *Kalfus*, 6 Dana [Ky.], 43), the ferry franchise cannot be held and conveyed as an incorporeal hereditament, absolute and separate from the real estate. *Haynes* v. *Wells*, 26 Ark. 464. See *Bowman* v. *Wathen*, 2 McLean (C. C.), 376.

A State may erect a new ferry so near an older one as to injuriously affect the value of the latter by withdrawing its custom, unless it be

protected by the terms of its grant (*Shorter* v. *Smith*, 9 Ga. 517; *Fanning* v. *Gregoire*, 16 How. [U. S.] 524; *Costar* v. *Brush*, 25 Wend. 628; *Mayor, etc., of Columbus* v. *Rodgers*, 10 Ala. 37; *Piatt* v. *Covington, etc., Bridge Co.*, 8 Bush [Ky.], 31); but an individual may not do so, without authority from the State. See *post*, § 4.

Where the legislature grants a charter for a ferry, with a right of way over the lands of another, for the term of five years, and subsequently renews the charter for the term of fourteen years, the renewal carries with it the right of way for the extended term. *Guignard* v. *Kinsler*, 4 So. Car. 330.

§ 3. **Liabilities of owner.** In general, the party entitled to the ferry franchise has imposed upon him by law certain duties, he incurs certain liabilities, and he has a remedy against any one, who, without right, interferes with his profits, or disturbs him in the enjoyment of his property. *Blissett* v. *Hart*, Willes, 508; *Day* v. *Stetson*, 8 Me. 365. He is regarded as a common carrier, and, as such, is held liable for all losses except such as are occasioned by the act of the person employing him, the act of God, and of the enemies of the country. *Wilson* v. *Hamilton*, 4 Ohio St. 722; *Pomeroy* v. *Donaldson*, 5 Mo. 36; *Albright* v. *Penn*, 14 Tex. 290. See *ante*, Vol. 2, 11, 13, 21, title *Common Carriers*. In some recent cases it has, however, been distinctly held, that ferrymen are not chargeable as common carriers for the absolute safety of property retained by a passenger in his own custody and under his own control. *Wyckoff* v. *Queens County Ferry Co.*, 52 N. Y. (7 Sick.) 32; S. C., 11 Am. Rep. 650; *Harvey* v. *Rose*, 26 Ark. 3; S. C., 7 Am. Rep. 595. So, it is now well settled, that the landlord of a ferry, rented and occupied by a tenant under him, is not liable for losses occasioned in crossing the ferry. The remedy is against the tenant, because such tenant is *pro hac vice* the owner. *Felton* v. *Deall*, 22 Vt. 170; *Claypool* v. *McAllister*, 20 Ill. 504; *Ladd* v. *Chotard*, Minor (Ala.), 366; *Norton* v. *Wiswall*, 26 Barb. 618; *Biggs* v. *Ferrell*, 12 Ired. (N. C.) L. 1. It is otherwise, however, where the owner employs one to act as ferryman for a certain length of time, and agrees to pay him a certain proportion of the profits, as his hire. In such case the ferryman does not become the owner; and if a loss has been sustained by a third person, his right of action is against the owner of the franchise, because the ferryman is his servant, and is doing the work for him. Id.; Angell on Highways, § 421.

If parties assume to act as ferrymen without license, they cannot take advantage of their own wrong to avoid the responsibility which is attached to their calling. *Polk* v. *Coffin*, 9 Cal. 56. See *post*, 350, § 8.

§ 4. **Protection of the franchise.** The owner of an established

ferry has a right of action at common law against him who either keeps in his neighborhood a free ferry, or a ferry not authorized by the proper tribunal, whereby an injury accrues to the owner of the established ferry. *Long* v. *Beard*, 3 Murph. (N. C.) 57. And as it respects the right of action, there is no difference between ancient ferries and those established by express grant; for when a ferry is prescribed for, it is upon the ground that there was originally a grant, which is presumed after long use. *Stark* v. *McGowen*, 1 Nott & M. (S. C.) 387. And see *Gates* v. *McDaniel*, 2 Stew. (Ala.) 211. So, continuous encroachments upon the enjoyment of a ferry franchise constitute a private nuisance which courts of equity will abate by injunction. *Walker* v. *Armstrong*, 2 Kans. 198, 219; *Newport* v. *Taylor*, 16 B. Monr. (Ky.) 699. So if one, who has an exclusive right, under a public grant, to receive tolls from persons crossing a river at a certain point, be essentially disturbed in the enjoyment of this right, by a ferry established by another, he is entitled to an injunction. *Hartford Bridge Co.* v. *East Hartford*, 16 Conn. 171. But, it has been held that an injunction will not be granted at the instance of the owner of a ferry to restrain a *free* ferry which has been established near by the old one, and to its injury. *Long* v. *Merrill*, 2 Tayl. (N. C.) 549. Any person has a right to transport himself and his property over a river in his own boat, even though there may be a ferry at the place where he crosses. *Weld* v. *Chapman*, 2 Iowa, 524. But, if he makes the exercise of this right a cloak for carrying travelers, it becomes an infringement on a ferry right. Id.

There is said to be no general rule of law prescribing the distance within which the keeper of a public ferry is secured against the establishment of any other public ferry. *O'Neill* v. *Caddo*, 21 La. Ann. 586.

A mere stranger cannot question the right of one in possession of the franchise, on the ground that the conditions on which it was granted have not been performed. *Harrell* v. *Ellsworth*, 17 Ala. 576; *New Albany & Salem R. R. Co.* v. *Huff*, 19 Ind. 315. In an action for disturbing a ferry, a defense that the ferry occupied by him was granted by a competent tribunal, is a good defense until the grant, if erroneous, is reversed. *Conner* v. *Paxson*, 1 Blackf. 168.

§ 5. **Franchise, how lost.** The franchise may be forfeited by *non-user* or *misuser*, judicially ascertained. *Benson* v. *Mayor, etc., of New York*, 10 Barb. 223; *Philips* v. *Bloomington*, 1 G. Greene, 498. *Non-user* for forty years was held to be an abandonment of the franchise. *Smith* v. *Harkins*, 3 Ired. (N. C.) Eq. 613. And where a ferry had been disused for more than three years, a court of equity refused to interfere, at the instance of the owner, to prevent others from invading

the franchise, although it had not been declared forfeited on *quo warranto*, or other like proceeding. *Trent* v. *Carterville Bridge Co.*, 11 Leigh (Va.), 521.

But a ferry license is not vacated nor the franchise lost by the death of the party to whom it was granted, but the franchise passes to his representative. *Lippencott* v. *Allander*, 27 Iowa, 460; S. C., 1 Am. Rep. 299.

§ 6. **Right to tolls or fares.** As an equivalent for the obligations imposed by law upon the owner of the franchise, he is authorized to exact a toll from those who make use of his ferry. This right of a ferryman to his toll is a common law right, and every subtraction from his profits, by carrying his customers over the same stream, whether for pay or not, is an injury for which he may recover damages. *Taylor* v. *Wilmington, etc., R. R. Co.*, 4 Jones (N. C.), 277. And where a person has been in the habit of crossing a ferry without paying toll, the jury, in an action against him for the toll, may presume that he knew the rates and contracted to pay them, although they were not posted up as required by statute. *Addison* v. *Hard*, 1 Bailey (S. C.), 431. In North Carolina, a power of distress given in case of refusal to pay toll was held constitutional, the action of replevin being a remedy for its abuse. *State* v. *Patrick*, 3 Dev. (N. C.) 478.

A person crossing a ferry in a boat not belonging to the ferry, and stepping into the ferry boat in order to land, is not liable in an action for the recovery of ferriage (*Henry* v. *Turner*, 2 Port. [Ala.] 23); though he might be held responsible for the invasion of the plaintiff's franchise, or for trespass. Id.

A custom, that the inhabitants of a certain village should pass over a ferry toll free, has been held good. See *Pain* v. *Patrick*, 3 Mod. 289; S. C., 1 Show. 257; 1 Salk. 12.

§ 7. **Rights of ferryman.** A ferryman has a right to the transport of the passengers using the way, and whoever makes a landing place near the ferry so as to be in substance the same as the ferry landing place, making no material difference to travelers, is guilty of a tort. Add. on Torts, 12. So, the owner of a ferry must have a right to use the land on both sides of the water, for the purpose of embarking and disembarking his passengers, but he need not have any property in the soil on either side. *Peter* v. *Kendal*, 6 B. & C. 703. And see *State* v. *Wilson*, 42 Me. 9. But see *Chambers* v. *Furry*, 1 Yeates (Penn.), 167; *Chess* v. *Manown*, 3 Watts (Penn.), 219. The grant of a right to keep a public ferry on a navigable stream does not, however, authorize the grantee of the ferry to place any obstruction across the stream on which the ferry is situated; and, therefore, where a rope was stretched across

a river to pull the ferry boat over, the owner of the ferry was held responsible for an injury arising from that cause. *Babcock* v. *Herbert*, 3 Ala. 392; *Steamboat Globe* v. *Kurtz*, 4 Greene (Iowa), 433.

So, the agent of a ferry company has no right to expel a passenger from a ferry boat for violating a regulation of the company, requiring passengers to enter the boat through a certain gate and deliver their tickets thereat, without first notifying such passengers of the existence of the regulation. Nor has such agent the right to touch the person of the passenger without first notifying him that, unless he leaves the boat, he will be put off by force. *Compton* v. *Van Volkenburgh*, 34 N. J. L. 134.

§ 8. **Duties and liabilities.** A right of ferry, being in derogation of the common rights of the public, rests upon the corresponding obligation on the part of the grantee of the right to maintain the ferry at all times for the use of the public, this obligation being enforceable by indictment and fine. *Letton* v. *Goodden*, L. R., 2 Eq. 123. See *State* v. *Peckham*, 9 R. I. 1. And an action on the case for damages will likewise lie against the grantee in favor of any individual who has sustained a special injury by reason of an obstruction to the use of the ferry. *Pain* v. *Patrick*, 3 Mod. 289. But an action does not lie for a single refusal to carry a passenger over a ferry, unless the toll has been paid or tendered (id.); though, if payment or a tender thereof has been made, an action is maintainable, notwithstanding the plaintiff has likewise a right by statute to sue for and recover a penalty for such refusal. *Wallen* v. *McHenry*, 3 Humph. (Tenn.) 245.

The public grant the exclusive privileges of ferrying upon the consideration that the traveling public shall be accommodated at all reasonable hours, without unnecessary delay. *Jabine* v. *Midgett*, 25 Ark. 475. And it has been held that the keeper or owner of a public ferry is bound to transport goods or persons across the stream even after nightfall (*Pate* v. *Henry*, 5 Stew. & Port. [Ala.] 101), unless there be some sufficient excuse for not doing so; such as the prevalence of high winds rendering it dangerous to attempt to cross, or that the application was made after the usual bed-time, and that the residence of the keeper was at some distance from the ferry. Id. And see *Phillips* v. *Bloomington*, 1 Iowa, 498.

It is the duty of ferrymen, or a *ferry company*, to provide a good and safe boat, suitable for the business in which they are engaged; and they are required to have all suitable and requisite accommodations for the entry upon, the safe transportation while on board, and the departure from the boat, of all horses and vehicles passing over such ferry. They are also required to be provided with all proper and

necessary servants and agents requisite for the safe and proper conducting of the business of the ferry; and with all proper and suitable guards and barriers on the boat, for the security of the property thus carried on the boat, and to prevent damage from such casualties as it would naturally be exposed to, though there was ordinary care on the part of the traveler. For neglect of duty in these respects, they will be held liable. DEWEY, J., in *White* v. *Winnisimmet Co.*, 7 Cush. 155, 157. And see *Walker* v. *Jackson*, 10 Mees. & W. 161; *Willoughby* v. *Horridge*, 12 C. B. 742; *Wyckoff* v. *Queens County Ferry Co.*, 52 N.Y. (7 Sick.) 32; 11 Am. Rep. 650; *Hazman* v. *Hoboken Land and Improvement Co.*, 2 Daly (N. Y.), 130; *Richards* v. *Fuqua's Adm'rs*, 28 Miss. 792.

§ 9. **Liabilities for negligence.** The letting down of the chains which guard the passage from a ferry boat to the bridge, by one of the servants of the ferry company, before the boat is properly secured to the bridge, is an act of negligence which will render the company liable for damages sustained in consequence thereof. *Ferris* v. *Union Ferry Co.*, 36 N. Y. (9 Tiff.) 312; S. C., 1 Trans. App. 313. The letting down of such chain by the servant having that duty in charge, is an assurance to the passengers that the boat is properly secured to the bridge, and that the passage-way is safe for exit. Id. It is likewise negligence in a ferry proprietor not to provide a ferry-bridge which can be raised and lowered with the tide, so as to be brought to a level with the boat while discharging its passengers (*Hazman* v. *Hoboken Land, etc., Co.*, 2 Daly [N. Y.], 130); and it is negligence to order vehicles to be driven off the boat while it is at an unsafe distance above or below the level of the bridge. Id.; 50 N. Y. (5 Sick.) 53. So, if a ferry company, at the very threshold of its gate, places a log, against which its passengers would be in danger of stumbling in the dark, it is bound to do every thing in its power to guard against the danger. And the omission to place a light on the premises is such negligence as will make it liable for damages to any passenger injured by the obstruction. *Osborn* v. *Union Ferry Co.*, 53 Barb. 629. But the use of a brass covering to stairs upon a ferry boat, which by long wear has become smooth and slippery, was held not to be such negligence on the part of the company owning the boat as to render it liable for an injury to a passenger caused by slipping upon the stairs. *Crocheron* v. *North Shore, etc., Ferry Co.*, 56 N. Y. (11 Sick.) 656.

As soon as a carriage is fairly on the drop or slip of a flat, though it be driven by the owner's servant, it is in the ferryman's possession, and he is held liable for any subsequent damage that happens to it, or to

the horses. *Cohen* v. *Hume*, 1 McCord (S. C.), 439. And see *Pomeroy* v. *Donaldson*, 5 Mo. 36.

In an action against a ferryman, on his contract for the transportation of animals which fell off the ferry-boat and were drowned, through his alleged carelessness in not furnishing the boat with a barrier where they fell, evidence that just such a boat had been used to transport animals over the ferry daily for thirty years, and that no accident had ever before occurred, was held to be inadmissible. *Lewis* v. *Smith*, 107 Mass. 334. See Vol. 2, 32.

§ 10. **Liability as a common carrier.** As to the liability of a ferryman as a common carrier, see *ante*, 347, § 3. See, also, title *Common Carriers*, *ante*, Vol. 2, 11, 13.

A public ferryman is presumably responsible, as a common carrier, for property received by him for transportation. *Harvey* v. *Rose*, 26 Ark. 3; 7 Am. Rep. 595. The mere fact that the goods were accompanied by the owner does not relieve him from liability; it must be shown that the owner did not intrust him with the care, but retained the exclusive management of the goods to himself. Id.

§ 11. **Statute regulations.** There are statutory provisions in the various States relating to, and regulating ferries, some of which will be briefly noticed. All ferries in Massachusetts and in Maine depend upon the general law, except such as were stated and settled as early as 1695. *Day* v. *Stetson*, 8 Me. 365. A statute of the former State, limiting rates of toll to be charged by ferry companies for passengers transported on the cars of street railway companies, is constitutional, and binds a ferry company, although incorporated before its passage, whose charter is liable to alteration or repeal. *Parker* v. *Metropolitan R. R. Co.*, 109 Mass. 506.

The Revised Code of Georgia provides for the establishment of ferries, private and public, in that State. A franchise of a ferry is the subject of sale, and may be transferred and inherited. So, the franchise may be lost by non-user, but under the provisions of the Code, the forfeiture only dates from the judgment of a court of competent jurisdiction declaring the forfeiture. *Greer* v. *Haugabook*, 47 Ga. 282, 286.

In Kansas, a party who holds a ferry franchise granted by special act of the legislature need not also obtain a license from the county tribunal for that purpose. *Kansas* v. *Rerburn*, McCahon (Kan.), 134.

To justify the establishment of a ferry across the Ohio river, the applicant must own the land on the Kentucky shore. *Givens* v. *Ferguson*, 6 T. B. Monr. (Ky.) 186; *Trustees of Jefferson Seminary* v. *Wagnon*, 2 A. K. Marsh. (Ky.) 379. But under the statutes it is not

necessary on any stream, except the Ohio, that the grantee of a ferry should own the land on the stream. *Richmond, etc., Co.* v. *Rogers*, 1 Duv. (Ky.) 135. And when the owner of land, on one bank of a river, has established a ferry and continued to enjoy, for more than fifty years, the privilege of landing on the opposite bank, a grant of such privilege will be presumed. *Clark* v. *White*, 5 Bush (Ky.), 353. Where a statute authorized a municipal corporation to lease a ferry at "public outcry," and the corporation leased the ferry by private contract, it was held, that while such lease might be voidable, as between lessor and lessee, it was not void, and its validity could not be denied or questioned by a stranger, who attempted to run an unlicensed opposition ferry. *Owens* v. *Roberts*, 6 Bush (Ky.), 608.

In California, franchises for erecting ferries, being sovereign prerogatives, belong to the political power of the State, and are primarily represented and granted by the legislature as the head of the political power. *Fall* v. *County of Sutter*, 21 Cal. 237. But this power has been delegated by statute to the courts of sessions and boards of supervisors, and grants made by these subordinate tribunals are equally valid as if made by the legislature directly. Id. No person has a right to establish a ferry, so as to receive compensation for the same, unless authorized to do so by license issued according to law. *Norris* v. *Farmers', etc., Co.*, 6 Cal. 590. See, also, *Thomas* v. *Armstrong*, 7 id. 286; *Waugh* v. *Chauncey*, 13 id. 11.

The act of congress declaring the Mississippi river to be a common highway, free to all citizens of the United States, was not intended to interfere with the right of the State to create and regulate ferries. *Chiapella* v. *Brown*, 14 La. Ann. 189. And see *Marshall* v. *Grimes*, 41 Miss. 27.

In North Carolina, a county court may grant the privilege of erecting a ferry over a river to a person who does not own the lands on either side (*Raynor* v. *Dowdy*, 1 Murph. [N. C.] 279); and the county courts likewise have power to establish two ferries at the same point. *Anonymous*, 1 Hayw. (N. C.) 457. So, in Tennessee, the county courts may license ferries across navigable rivers, though the opposite bank be out of the jurisdiction of the State. *Corporation of Memphis* v. *Overton*, 3 Yerg. (Tenn.) 387. The right to keep the ferry, and the profits arising therefrom, are conferred by statute on the owner of the soil on the bank, in preference to one having no interest therein (*Allen* v. *Farnsworth*, 5 id. 189); but if he do not apply, the county court may grant it to another. *Sparks* v. *White*, 7 Humph. (Tenn.) 86. See *ante*, § 2. In Texas, no authority has been given by statute to the

county court to establish ferries over streams which are national boundaries. *Ogden* v. *Lund*, 11 Tex. 688.

The discontinuance of a ferry is not an indictable offense in Virginia. *Carter* v. *Commonwealth*, 2 Va. Cas. 354.

In Iowa, where the requirements and conditions of a lease to keep a ferry have been violated by the lessee, a court of equity may declare the same to be forfeited. *Phillips* v. *Bloomington*, 1 Greene (Iowa), 498.

A ferry franchise, being a hereditament, comes within the term "lands" in the English Lands Clauses Act, and statutory compensation, therefore, is claimable from a railway company, who, in pursuance of their act, erect a bridge for foot passengers so near the ferry, as to disturb it. *Reg.* v. *Cambrian Railway*, L. R., 6 Q. B. 422.

§ 12. **Remedies for invasion of franchise.** See *ante*, 347, § 4; also title *Case*, *Action on*, *ante*, Vol. 2, 108. In general, the owner of a ferry has a cause of action against every intruder who carries in the line of the ferry, whether it be done directly or indirectly. And it is enough for the plaintiff to prove that he was in possession of a ferry at the time the cause of action arose, to entitle him to maintain his action for the disturbance of it. *Trotter* v. *Harris*, 2 Y. & J. 285; *Peter* v. *Kendal*, 6 B. & C. 703. Neglect of duty in the owner of a ferry is no answer to an action for disturbance. Id. And see *Cotton* v. *Houston*, 4 T. B. Monr. (Ky.) 288.

Forcible entry and detainer will not lie for a ferry. *Rees* v. *Lawless*, Litt. Sel. Cas. (Ky.) 184. As to the remedy by an injunction for disturbance of a ferry, see *ante*, 347, § 4. See, also, *Injunction*.

CHAPTER LXVIII.

FISH AND FISHERY.

ARTICLE I.

OF FISHERIES IN GENERAL.

Section 1. Definition and nature. A fishery has been generally defined as a right or liberty of taking fish in the waters of another person. 2 Bl. Com. 34, 39; 3 Kent's Com. 409; 1 Broom & Had. Com. (Wait's ed.) 489. It is a profit *a prendre* in another's soil (*Wickham* v. *Hawker*, 7 Mees. & W. 63; *Tinicum Fishing Co.* v. *Carter*, 61 Penn. St. 21, 39. See *Hart* v. *Hill*, 1 Whart. [Penn.] 138); and the right may be acquired, distinct from the ownership of the soil itself, by grant, or prescription from which a grant may be presumed. *Cobb* v. *Davenport*, 32 N. J. Law, 369; *Same* v. *Same*, 33 id. 223. See *Melvin* v. *Whiting*, 13 Pick. 184. The word "fishery" is also employed to designate a place prepared for catching fish with nets or hooks. *Hunt* v. *Hill*, 1 Whart. (Penn.) 131, 132.

The general term "*piscaria*" includes all fisheries without any regard to their distinctive character, or to the method of taking the fish. *Moulton* v. *Libbey*, 37 Me. 472. Shell fisheries, including the digging of clams, are embraced in the *common* right of the people to fish in the sea, creeks and arms thereof. Id. See *Proctor* v. *Wells*, 103 Mass. 216.

§ 2. **Kinds of fishery.** There are many kinds of fishery recognized in the books, and in judicial decisions. Thus, among the earlier writers mention is made of a common fishery, a several or separate fishery, a free fishery, a common of fishery, and a fishery in gross. Later writers, however, generally treat the subject of fisheries under three classes; namely, *several*, *free*, and *common*. See Woolr. on Waters, 75, 110; Washb. Easm. & Serv. 417; 2 Kent's Com. 409, 410. Each of these classes will be treated of separately in subsequent sections.

The distinctions between the different classes of fishery above given are not clearly settled by the authorities; and it is suggested as a more easy and intelligible arrangement of the subject, to divide the right of fishing into a right common to all, and a right vested exclusively in one or a few individuals. 3 Kent's Com. 411. See *Freary* v. *Cooke*, 14 Mass. 488.

ARTICLE II.

RIGHT OF FISHERY.

Section 1. In general. The right of fishery is generally considered with reference to *navigable* waters, or those in which the tide ebbs and flows, and to waters *not navigable*, or those in which the tide does not ebb and flow. But it may be observed in this connection, that when the soil over which the stream runs, and the water itself, belong to the same person, it cannot with entire accuracy be said that such an individual has a right of fishery; because the land and its profits are so completely identified as his inheritance, that they cannot be separated. If any description be applied to it, it should be that of *territorial* fishing, for the reason that the party has the dominion over the territory or land itself. See Woolr. on Waters, 110. And see *post*, 359, § 6.

The right to fish may be founded upon contract. *Russell* v. *Russell*, 15 Gray, 159. And an action lies to recover the sum due for such privilege. Id.

§ 2. **In the sea and tide-waters.** By the common law, all persons have a common and general right of fishing in the sea, and in all bays, coves, branches, and arms of the sea, which in general is held to extend to all places where the tide ebbs and flows (*Carter* v. *Murcot*, 4 Burr. 2162; *Warren* v. *Matthews*, 1 Salk. 357; *Blundell* v. *Catterall*, 5 Barn. & Ald. 268; *Parker* v. *Cutler Milldam Co.*, 20 Me. 353; *Delaware, etc., R. R.* v. *Stump*, 8 Gill & J. [Md.] 479); and this public right of fishing includes shell fish as well as floating or swimming fish. *Proctor* v. *Wells*, 103 Mass. 216; *Commonwealth* v. *Bailey*, 13 Allen, 542; *Dean* v. *Jersey Co.*, 15 How. (U. S.) 432; *Moulton* v. *Libbey*, 37 Me. 472; *Peck* v. *Lockwood*, 5 Day, 22; *Bagott* v. *Orr*, 2 Bos. & Pul. 472. See *Lowndes* v. *Dickerson*, 34 Barb. 586. See *Proprietors, etc.* v. *Herrick*, 9 Gray, 529, as to the right to take shell fish between high and low-water mark. It has been held in some of the cases that an individual may have an exclusive right of fishing in an arm of the sea. See *Jacobson* v. *Fountain*, 2 Johns. 170; *Rogers* v. *Jones*, 1 Wend. 237. But this is not so *prima facie*, and must be proved by ancient grant. *Weston* v. *Sampson*, 8 Cush. 347, 352. And it has been frequently held that such right cannot be founded on the king's grant, made within the time of memory; and, so also it has been held that no such right could be conferred by authority of the crown under *magna charta*. *Somerset* v. *Fogwell*, 5 Barn. & Cr. 884; *Blundell* v. *Catterall*, 5 B. & Ald. 268; *Mayor, etc., of Carlisle* v. *Graham*, L. R., 4 Exch. 361; *Browne* v. *Kennedy*, 5 Harr. & J. (Md.) 203; *Mal-*

comson v. *O'Dea*, 10 H. L. Cas. 593. The right of fishing in navigable rivers and arms of the sea is presumptively free, but may become exclusive in the owner of the adjacent soil by grant or prescription, subject to the public right of navigation. *Trustees of Brookhaven* v. *Strong*, 60 N. Y. (15 Sick.) 56. The right of several fishery is dependent upon and connected with the ownership of the soil under water; and when such ownership is established the right may attach as well to an arm of the sea, where the tide ebbs and flows, as to fresh waters. Id. By the common law the king had the right to grant the soil under navigable waters, and with it the exclusive right of fishery, and this right was not taken away by *magna charta*. Id. A colonial governor might also grant this right. Id.

In reference to the principle above stated, it is, however, proper to add, that this public right of fishing in the sea, etc., may be regulated and abridged by the legislature, who have the control and guardianship of all public rights. *Dunham* v. *Lamphere*, 3 Gray, 268; *Moulton* v. *Libbey*, 37 Me. 472. In England, this is often done by act of parliament, regulating ports and harbors, and authorizing wharves, docks, and other erections, which to some extent may abridge the right. And this is usually done in consideration of greater public good expected from such improvements. *The King* v. *Montague*, 4 Barn. & Cr. 598. And see *Proctor* v. *Wells*, 103 Mass. 216; *Tinicum Fishing Co.* v. *Carter*, 61 Penn. St. 21. Under the local law of Massachusetts, public fisheries may be appropriated by the town in which the waters lie. *Coolidge* v. *Williams*, 4 Mass. 140. And see *Commonwealth* v. *Chapin*, 5 Pick. 199.

§ 3. **In navigable rivers.** It is an undisputed doctrine of the common law, that, in rivers where the tide ebbs and flows, the right of fishing is public or common, unless an express monopoly is granted to individuals, or is acquired by prescription. See *Trustees of Brookhaven* v. *Strong*, 60 N. Y. (15 Sick.) 56; *Paul* v. *Hazleton*, 37 N. J. Law, 106; *Preble* v. *Brown*, 47 Me. 284. And in some of the States of the Union, the right of fishing in the large rivers, though not tide-waters, is held to be vested in the State and open to all the world. Thus, riparian owners on such rivers as the Susquehanna and Delaware, for instance, so far up as they have a capacity for public use as commercial highways, have no exclusive right of fishing in the rivers opposite their respective lands. *Carson* v. *Blazer*, 2 Binn. (Penn.) 475; *Shrunk* v. *Schuylkill Navigation Co.*, 14 Serg. & R. 71; see, also, *Tinicum Fishing Co.* v. *Carter*, 61 Penn. St. 21. And such also seems to be the accepted doctrine in North and South Carolina. *Cates* v. *Wadlington*, 1 M'Cord (S. C.), 580; *Collins* v. *Benbury*, 3 Ired. (N. C.) 277. In

the case last cited, it was held, that no general or exclusive right of fishery existed in the navigable waters of the State, and that a stream was to be deemed navigable when the waters were sufficient *in fact* to afford a common passage for people in sea-vessels. *Chalker* v. *Dickinson*, 1 Conn. 382. The same rule is likewise thought applicable to the great rivers in the western States. See Houck on Rivers, § 225.

The riparian owner possesses, however, the sole right, unless he has granted it, of fishing with nets or seines in connection with his own land. *Coolidge* v. *Williams*, 4 Mass. 140; *Hart* v. *Hill*, 1 Whart. (Penn.) 138; *Whittaker* v. *Burhans*, 62 Barb. 237; *Lay* v. *King*, 5 Day (Conn.), 72. And such great advantages does this exclusive right give riparian proprietors on the river Schuylkill, that it has been hardly thought worth while for any other persons to attempt to fish with seines. *Shrunk* v. *Schuylkill Navigation Co.*, 14 Serg. & R. 71.

In Massachusetts, the owner of land upon the banks of a river, in which the tide ebbs and flows, does not make himself liable to an action by planting stakes on his own flats, in such a manner as to obstruct another person's right of taking fish. *Locke* v. *Motley*, 2 Gray, 265.

§ 4. **In streams not navigable.** It is the general doctrine in England, and recognized to a great extent in this country, that in rivers and streams not navigable in the common-law sense of the term, that is, in all waters above the flow of the tide, the owners of the soil over which the waters flow have the exclusive right of fishing each on his own side, unless some other person can show a grant or prescription for a common of piscary, in derogation of the right naturally attached to the ownership of the soil. *Browne* v. *Kennedy*, 5 H. & J. 195. If the same person owns the lands on both sides, the property in the soil is wholly in him, subject to certain duties in the public; and if different persons own the land on opposite sides, each is proprietor of the soil under the water, to the middle or thread of the river or stream. *Hooker* v. *Cummings*, 20 Johns. 90, 99; *Adams* v. *Pease*, 2 Conn. 481; *McFarlin* v. *Essex Co.*, 10 Cush. 309; *Waters* v. *Lilley*, 4 Pick. 145; *Jackson* v. *Keeling*, 1 Jones' (N. C.) L. 299; *Moulton* v. *Libbey*, 37 Me. 472; *Browne* v. *Kennedy*, 5 H. & J. 195; Harg. Law Tracts, 8, 9; 6 Cow. 537; 3 Kent's Com. 418. But see *People* v. *Canal Appraisers*, 33 N. Y. (6 Tiff.) 461; and see the exceptions to the common-law rule stated in the preceding section.

There is, of course, no public right of fishery in private streams, or such as are in no sense navigable.

§ 5. **Right to fish, how acquired.** While the right of fishing in fresh water rivers in which the soil belongs to the riparian owners is exclusive, the right of fishing in the sea, its arms and estuaries, and in

its tidal waters wherever it ebbs and flows, is held by the common law to be *publici juris*, and so to belong to all the subjects of the crown, the soil of the sea, and its arms, and estuaries, and tidal waters, being vested in the sovereign as a trustee for the public. The exclusive right of fishing in the one case, and the public right of fishing in the other, depend upon the existence of a proprietorship in the soil of the private river by the private owner, and by the sovereign in a public river respectively. *Murphy* v. *Ryan*, 2 Ir. Rep. C.L. 143; *Mayor, etc., of Carlisle* v. *Graham*, L. R., 4 Exch. 361, 366. But although the right of fishery in navigable rivers and arms of the sea is presumptively free, yet this right may become exclusive in the owner of the adjacent soil by grant or prescription, subject to the superior public right of navigation; for, assuming a technical defect of power in the crown imposed by the restraints of *magna charta* (see *ante*, 354, § 2), still the authority of the legislative power is ample to make such grants. Id.; *Trustees of Brookhaven* v. *Strong*, 60 N. Y. (15 Sick.) 56; *Chapman* v. *Hoskins*, 2 Md. Ch. 485. So the right of fishery incident to the ownership of the soil of a river or other stream may be granted to another by the owner thereof, while retaining the soil and freehold of the premises, either to be enjoyed in common with himself, or to be exclusively enjoyed by such grantee as a separate incorporeal hereditament. Hargr. Law Tracts, 5; *Carter* v. *Murcot*, 4 Burr. 2165; Washb. Easm. & Serv. 411. And such right may be acquired by prescriptive user and enjoyment to the same extent as by grant. Id.; *Gould* v. *James*, 6 Cow. 369, 376; *Day* v. *Day*, 4 Md. 262; *Mayor of Oxford* v. *Richardson*, 4 Term R. 437, 439. But to gain an exclusive right by possession and use in any case, the possession and use must be exclusive as well as uninterrupted. *Chalker* v. *Dickinson*, 1 Conn. 382; *Collins* v. *Benbury*, 5 Ired. L. 118. But where fish of a certain kind have been accustomed to ascend a particular river, no individual can prescribe against this right, which belongs to the public. *Cottrill* v. *Myrick*, 12 Me. 222.

§ 6. **Of a several fishery.** A *several* fishery is said to be an exclusive right to fish, usually in a private river or water, not navigable, and may be confined to the right to fish there, or may also include the ownership of the soil. 1 Chit. Gen. Prac. 224. A several fishery in a navigable river is an incorporeal and not a territorial hereditament. Id. See farther, as to the definition of a several fishery, *Malcomson* v. *O'Dea*, 10 H. L. Cas. 618; *Preble* v. *Brown*, 47 Me. 284; *Stoughton* v. *Baker*, 4 Mass. 522; *Seymour* v. *Courtenay*, 5 Burr. 2814. It has long been made a question whether the ownership of the soil covered with water be essential to a *several* fishery. See Woolr. on Waters,

111 *et seq.* But there would seem to be no good reason why a several fishery should not exist without the soil as well as a several pasture (Co. Litt. 122 (b.), n. 7; *Cortelyou* v. *Van Brundt*, 2 Johns. 357; *Melvin* v. *Whiting*, 7 Pick. 79); and the weight of authority favors this view. See Id.; Woolr. on Waters, 111 *et seq.;* Ang. on Water-courses, § 72; *Cobb* v. *Davenport*, 32 N. J. Law, 369. But see 2 Bl. Com. 39. It is, however, held that the owner of a several fishery, in ordinary cases, and where the terms of the grant are unknown, may be presumed to be the owner of the soil (*Somerset* v. *Fogwell*, 5 B. & C. 875; *Holford* v. *Bailey*, 8 Ad. & El. [N. S.] 1000, 1016); and this presumption is conclusive, if not opposed. *Partheriche* v. *Mason*, 2 Chitt. 658.

Although a several fishery is an exclusive property, the territorial owner, or his grantee or lessee, may, nevertheless, give permission to another person to fish, and yet preserve the several fishery. An owner of such description would still remain seized of his original estate or right; and he would be the several proprietor, although he should suffer a stranger to use a co-extensive right with him. Woolr. on Waters, 116 *et seq.*

A several fishery in a tidal river, the waters of which have permanently receded from one channel, and flow in another, cannot be followed from the old to the new channel. *Mayor of Carlisle* v. *Graham*, L. R., 4 Exch. 360. In Maryland, no person has a several or exclusive right of fishery in any of the navigable waters of the State. *Collins* v. *Benbury*, 3 Ired. 277. And what is a navigable stream there does not depend upon the common-law rule, but waters which are sufficient in fact to afford a common passage for people in sea vessels, are to be taken as navigable. Id. The grant of a several fishery, in a public navigable river, cannot be presumed from the mere uninterrupted use and enjoyment of a right of fishery for more than twenty years. *Delaware, etc., R. R. Co.* v. *Stump*, 8 Gill & J. 479.

§ 7. **Of a free fishery.** Widely differing explanations have been given in the books as to what is to be understood by a *free* fishery. Thus, Blackstone observes, that it is an exclusive right of fishing in a public river, and that it is also a royal franchise, and considered as such in all countries where the feudal polity has prevailed. He also distinguishes it from a several fishery, by connecting the ownership of the soil with the latter; and from a common of fishery, because it is an exclusive right, while the common is not; and then adds, that a man has a property in the fish before they are caught, which is not the case in a common of piscary. 2 Bl. Com. 39, 40. It is defined by Washburn to be, "a right derived by grant from one having a several fishery in

connection with his estate in the land, to be enjoyed not separately and alone, but in conjunction with the grantor himself." Washb. on Easm. and Serv. 417, 418. It is likewise spoken of as being a franchise in the hands of a subject existing by grant or prescription, distinct from an ownership in the soil. 3 Kent's Com. 410. And it is suggested by Mr. Woolrych that a free fishery is no other than an unlimited common of fishery. Woolr. on Waters, 126. In *Seymour* v. *Courtenay*, 5 Burr. 2814, it was declared essential to a free fishery that more than one person should have a co-extensive right in the same subject. And in the American case of *Melvin* v. *Whiting*, 7 Pick. 79, it was held, that a free fishery was not an exclusive fishery.

In this country any State has the power of granting this right, though it is an abridgment of the common rights of the people. And as it may be granted, it may be prescribed for. In England, such prescription must be founded on immemorial use and occupation, and is not like prescribing for an easement in the freehold of an individual. In this country, there have not been many decisions as to the length of time. 1 Swift's Dig. 110. See *Chalker* v. *Dickinson*, 1 Conn. 382.

§ 8. **Of a common fishery.** A common of fishery is defined to be a right in common with certain other persons to fish in a particular stream. The owner of this right has no property in the fish until he takes them. 2 Bl. Com. 39, 40. See, also, 3 Kent's Com. 409; *Benett* v. *Costar*, 8 Taunt. 183. By some it is claimed that there is no essential difference between a common of fishery and a free fishery. See Woolr. on Waters, 122, 123; Ang. on Water-courses, § 77; *Smith* v. *Kemp*, 2 Salk. 637; *Carter* v. *Murcot*, 4 Burr. 2162; *ante*, 360, § 7. And in a Massachusetts case, the opinion that a free fishery is only a common of fishery was adopted by the court as most agreeable to authority, and as the most conformable to the popular sense of the term "free fishery" in this country. *Melvin* v. *Whiting*, 7 Pick. 79.

A *common fishery*, which may mean the right of all mankind to fish, as in the case of fishing in the sea, is obviously distinguishable from *a common of fishery*, as defined above. *Benett* v. *Costar*, 8 Taunt. 182; 2 Moore, 83.

§ 9. **Exclusive right of fishery.** The owner of the whole of the soil over which a water-course runs, in its natural channel, is alone entitled to the use and profits of the water; and where a person owns the land upon one side of a water-course, his interest in the soil, and his right to the water, extend to the middle of the stream. See *ante*, title *Boundaries*, Vol. 1, p. 711. Connected with this interest in the soil of the beds of water-courses, is an exclusive right of fishery; so that the riparian proprietor, and he alone, is authorized to take fish from

any part of the stream included within his territorial limits. Ang. on Water-courses, § 61. And see 3 Kent's Com. 411; *Hooker* v. *Cummings*, 20 Johns. 90; *Hart* v. *Hill*, 1 Whart. (Penn.) 124; *McFarlin* v. *Essex Co.*, 10 Cush. 309; *Smith* v. *Miller*, 5 Mas. (C. C.) 191; *Ingram* v. *Threadgill*, 3 Dev. (N. C.) 59.

Oysters planted by an individual in a bed, clearly designated and marked out in a bay or arm of a sea, are the property of him who plants them, and trespass lies against any one interfering with them, though such spot is the common fishery of all the inhabitants of the town in which the bay is situated. *Fleet* v. *Hegeman*, 14 Wend. 42. It is, however, indispensable to the existence of the right of property in oysters thus planted, that the bed shall not interfere with the exercise of the common right of fishing; for if the oysters were mingled with and undistinguishable from others, of natural growth, in the public waters, the interest of the person planting them would be subservient to the public use. *Lowndes* v. *Dickerson*, 34 Barb. 586.

Clearing out a fishing place in a river does not give an exclusive right of fishing. *Westfall* v. *Van Anker*, 12 Johns. 424; *Contra*, *Pitkin* v. *Olmstead*, 1 Root, 219. So, the custom of fishing in unnavigable streams on the soil of another is not a good custom (*Bland* v. *Lipscombe*, 4 El. & Bl. 713, note; *Mills* v. *Mayor of Colchester*, L. R., 2 C. P. 476); and if it were, it ought to be specially pleaded. *Waters* v. *Lilley*, 4 Pick. 145. Such a right, if available at all, must be claimed as belonging to some estate, and by prescribing in a *que* estate. Id.

§ 10. **Easement in fishery.** It is only of fisheries which may be the subject of private property that easements can be predicated. If the right in an individual in severalty, or to be shared with others, be to take fish within another's freehold, it is an easement, and may be acquired by grant from the owner thereof, or by such a user as is evidence of such a grant under the name of a prescription, *ante;* and it may be to the entire exclusion of the owner of the soil from all right to share in the fishery. Washb. Easm. & Serv. 420. See *ante*, 359, § 6. But it must be shown to have been an actual and exclusive possession of the fishery, adverse to the right of the riparian proprietor, uninterrupted and continued at least twenty years. *McFarlin* v. *Essex Co.*, 10 Cush. 304; *Melvin* v. *Whiting*, 13 Pick. 184. See *Cobb* v. *Davenport*, 33 N. J. Law, 223.

§ 11. **Right subject to public right of passage.** The right to fish upon one's own land, or in a several fishery, is subordinate to the public use of the stream for navigable purposes. *Lewis* v. *Keeling*, 1 Jones' (N. C.) L. 299; *Adams* v. *Pease*, 2 Conn. 481; *Moulton* v. *Lib*

bey, 37 Me. 472. The rights of piscary and navigation remain unimpaired by the grant of land covered by a navigable river. *Wilson* v. *Inloes*, 6 Gill. (Md.) 124. The right of navigation is prior and superior to the right of fishing, and where they interfere, that of fishing must give way to the right of navigation. *Cobb* v. *Bennett*, 75 Penn. St. 326; 15 Am. Rep. 752. But this rule does not extend to acts of wantonness in navigating; and where a vessel ran into a net laid in a private fishery and damaged it, the captain was held liable, if upon being warned he could have changed his course without prejudice to the reasonable prosecution of his voyage. Id.

§ 12. **Obstructing passage of fish.** The common-law right of several fishery in the owners of land bordering on rivers not navigable is likewise subject to the reasonable qualification of not being so used as to injure the private rights of others; and it does not, therefore, extend to impede the passage of fish up the river by means of dams or other obstructions. *Weld* v. *Hornby*, 7 East, 195; *Case* v. *Weber*, 2 Carter (Ind.), 109; *Boatwright* v. *Beekman*, 1 Rice's (S. C.) Law, 447. This restriction is founded upon that universal principle of every just code of laws, *sic utere tuo ut alienum non lædas. Commonwealth* v. *Chapin*, 5 Pick. 199. The impediment was at common law a nuisance, and in some of the States it subjects the party creating it to a statute penalty. Id.; 3 Kent's Com. 411.

In a recent case in New Hampshire, the maxim "*nullum tempus occurrit regi*," was applied to an obstruction of fishways in an unnavigable river; and the doctrine was affirmed that an adverse user, which is known to have originated without right, within the memory of persons then living, would not of itself legitimate a public nuisance. *State* v. *Franklin Falls Co.*, 49 N. H. 240; S. C., 6 Am. Rep. 513.

§ 13. **Statutes relating to.** From the earliest times the subject of fisheries has been a matter of statutory regulation in England. And the regulation of fisheries within the jurisdiction of the several States of the Union is matter of statute provision; and the laws of some of the States have been numerous and very specific on the subject. In Maine and Massachusetts, the legislature has power to regulate the fisheries, and, in many cases, this power has been exerted within streams which by the common law would be private property. See *Peables* v. *Hannaford*, 18 Me. 106; *Vinton* v. *Welsh*, 9 Pick. 87; *Commonwealth* v. *City of Roxbury*, 9 Gray, 516 *et seq.*, note; *Commonwealth* v. *Vincent*, 108 Mass. 441; *Commonwealth* v. *Weatherhead*, 110 id. 175 Under the local law of Massachusetts, by which towns may appropriate the fish, in tide-waters, if not appropriated by the legislature no man can lawfully go on the soil of another, without his leave; and

if no such appropriation has been made, any citizen may take the fish, so that he does not trespass on the land of others. *Coolidge* v. *Williams*, 4 Mass. 140. In New York, the right of fishery in navigable and unnavigable rivers is regulated by the provisions of the Revised Statutes. See 1 R. S. 687. And in *Hooker* v. *Cummings*, 20 Johns. 90, it was said, that the legislature of New York "have confessedly the right of regulating the taking of fish in private rivers; and do, every year, pass laws for that purpose, as to rivers not navigable in any sense, and which are unquestionably private property." See, also, *People* v. *Reed*, 47 Barb. 235. Statutes for the protection of fish in particular waters, are forbidden by a constitutional restriction upon local legislation. Thus, it is held in Indiana, that the legislature has power, notwithstanding such restrictions in the State constitution, to enact a statute, limiting the time and mode of taking fish in specified waters. *State* v. *Boone*, 30 Ind. 225.

By the provisions of the Maryland Code authority is given to any citizen of a county bordering on the waters of the State to locate and appropriate within the waters thereof any area, not exceeding one acre for the purpose of depositing and bedding oysters, on condition that the area so located shall not interfere with certain reserved rights, nor impede navigation, and that it shall be marked out by proper bounds, and a written description thereof, under oath, recorded in the office of the clerk of the circuit court of the proper county, and for the unlawful removal of oysters so deposited, a penalty is provided. Code, art. 71, §§ 17, 18. It was held that this act did not derogate from the public right of fishing, and was constitutional and valid, and that it was not repealed by a subsequent act providing "that no patent should issue for land covered by waters." *Phipps* v. *State*, 22 Md. 380. See Vol. 1, 299, 301.

A State may pass laws prohibiting non-residents or citizens of other States from taking oysters within its territorial limits. *Corfield* v. *Coryell*, 4 Wash. (C. C.) 371. Such an enactment for the protection of property is to be considered as a matter of internal police and not a regulation of commerce with foreign nations or among the States. Nor does it contravene the provision of the Federal constitution that the citizens of each State shall be entitled to all the privileges of citizens in the several States. *Haney* v. *Compton*, 36 N. J. Law, 507.

Taking fish by many single baited hooks and lines, each in a distinct ice-hole, and all tended by one person, was held to be a violation of a statute prohibiting fishing in a certain pond otherwise than by "ordinary process of angling with single bait hook and line or artificial fly." *State* v. *Skolfield*, 63 Me. 266.

All laws regulating the taking of fish are for public benefit, to preserve the fish, and are public statutes, of which the court must *ex officio* take notice. *Burnham* v. *Webster*, 5 Mass. 266; *Commonwealth* v. *McCurdy*, id. 324.

ARTICLE III.

REMEDIES.

Section 1. In general. As already mentioned incidentally in preceding sections, injuries may be committed against *public* rights of fishing in various ways, as by throwing nets across a river to the hindrance of persons engaged in fishing, by erecting weirs whereby fish cannot escape, by taking fish at improper and unseasonable times, etc. And the chief remedies for obstructions and injuries to public fisheries appear to be by indictment, or information by *quo warranto*, and by abatement. See Woolr. on Waters, 227. Summary remedies are also given by various acts of the legislature, both in England (see *Rolle* v. *Whyte*, L. R., 3 Q. B. 286) and in this country; for instance, by proceeding before a magistrate, actions to recover penalties, etc. Some of these statutory provisions have been alluded to in preceding sections, and the statutes of the particular State should be consulted.

Obstructions and injuries to *private* fisheries may also be committed in a variety of ways. But whatever illegally lessens the enjoyment of a fishery is in some way or other the subject of punishment, whether it be effected by nuisances, by trespass, by depredation, or otherwise. For some acts the wrong-doer becomes civilly responsible, while for others he is rendered liable to be proceeded against criminally. Criminal proceedings are by indictment, or information, or summary convictions before magistrates. The civil remedy is, for the most part, an action to recover damages. Ejectment, trespass, trover, an action upon the case, and in equity, a bill of peace (*ante*, Vol. 1, 650, 651), or an injunction in some emergencies, are the proceedings to which resort is usually made. It may, however, be observed that upon some occasions the party injured may vindicate his own rights by abating the grievance under which he suffers, or by repossessing himself of the property which may have been taken from his fishery. Woolr. on Waters, 237.

§ 2. **Trespass.** The action in most common use on the subject of fisheries is trespass. It is the proper remedy for immediate injuries to a man's several or territorial fishery, that is, presuming the fishery to be attached to the soil. See *ante*, 359, art. 2, § 6; Vol. 1, 299, 301; *Holford* v. *Bailey*, 13 Q. B. 426; *Smith* v. *Kemp*, 2 Salk. 637; *Collins* v. *Ben-*

bury, 5 Ired. (N. C.) 118; *Hart* v. *Hill*, 1 Whart. (Penn.) 124. And this action of trespass may be sustained, although no fish be actually taken from the place in which the right or privilege is exercised. 1 Wms. Saund. 346 *a*, note; Woolr. on Waters, 239. Causing a superfluity of water to drown or overflow a fishery is a plain obstruction, and punishable by an action of trespass. *Courtney* v. *Collet*, 1 Ld. Raym. 274. See, also, *Hamilton* v. *Marquis of Donegal*, 3 Ridgw. 267.

§ 3. **Trover.** The remedy by action of trover may be adopted under some circumstances; as where a trespasser invades a several fishery, that is, where there is an exclusive property, or where a person having a free or common fishery has taken certain fish, which another improperly possesses himself of, and carries away. Woolr. on Waters, 239.

Where a party, under the Virginia statute relative to the planting of oysters, obtained an assignment of certain oyster beds, for the planting and sowing of oysters for one year, and paid the tax and had the beds staked off as required by the statute, it was held, that he had such an exclusive interest in them that he might maintain an action of unlawful detainer against a party who entered upon the beds and held them against him. *Power* v. *Tazewells*, 25 Gratt. (Va.) 786.

§ 4. **Action on the case.** An action on the case for consequential injuries is a common and efficient remedy, when the fishery claimed is separate from the land. See Vol. 2, 99, 126, title *Case, Action on.*

§ 5. **Ejectment.** It was for a long time held, that ejectment would not lie for a fishery. *Molineux* v. *Molineux*, Cro. Jac. 146. This incompetency to bring ejectment respects the incorporeal right, because, where the soil is in question, any fishery incident thereto will pass along with it. The difficulty arises when the privilege is independent of the land. Id. See, also, *Waddy* v. *Newton*, 8 Mod. 276. Nevertheless, it was said by Ashurst, J., in *Rex* v. *Old Alresford*, 1 Term. R. 358, "there is no doubt but that a fishery is a tenement; trespass will lie for an injury to it, and it may be recovered in ejectment." *Ante*, p. 6. But Mr. Woolrych observes in reference to this language, that "there seems to be nothing in the opinion of Mr. Justice Ashurst to warrant a conclusion that he intended any other fishery than one which was connected with the soil." Woolr. on Waters, 240.

§ 5. **Injunction.** An injunction will be granted to restrain the fouling of water to such an extent as to render it unfit for fish to live in. *Aldred's Case*, 9 Co. R. 59 *a.*; *Att.-Gen.* v. *Borough of Birmingham*, 4 K. & J. 528; *Oldaker* v. *Hunt*, 31 Eng. Law & Eq. 503. And where a party had, by erecting an embankment and inclosing the bed of a river, shut out and prevented the tide from reaching a mussel-

bed and breeding-ground, the court granted an injunction on the principle of irreparable damage, without deciding or entering upon the question as to the ownership of the soil. *Bridges* v. *Highton*, 11 L. T. (N. S.) 653.

A statute protecting weirs erected for the purpose of taking fish may authorize the issuing of an injunction in a proper case; but where the facts do not show a violation of the statute, and the proceeding is founded upon such statute, an injunction will be refused. *Stannard* v. *Hubbard*, 34 Conn. 370.

CHAPTER LXIX.

FIXTURES.

ARTICLE I.

OF FIXTURES IN GENERAL.

Section 1. Definition and nature. The term "fixtures" is of modern origin, and is not to be found in the more ancient books of the law. See *Sheen* v. *Rickie*, 5 Mees. & W. 175. In its broadest signification the term is employed to designate any thing which is by artificial means attached permanently or substantially to the soil or freehold. *Walker* v. *Sherman*, 20 Wend. 636, 639; *Providence Gas Co.* v. *Thurber*, 2 R. I. 22; *Farrar* v. *Chauffetete*, 5 Denio, 527; *Teaff* v. *Hewitt*, 1 Ohio St. 511. And it was the old rule of law that whatever became fixed to the realty thereby became necessary to the freehold, and partook of all its legal incidents and properties, and could not be severed and removed without the consent of the owner. See Co. Litt. 53 *a*, 4; *Dudley* v. *Warde*, Ambl. 113; *Elwes* v. *Mawe*, 3 East, 38; *Minshall* v. *Lloyd*, 2 M. & W. 450. This rule has, however, been greatly relaxed in modern times by exceptions to it, established in favor of trade, and also in favor of the tenant, as between landlord and tenant. And the technical meaning acquired by the word "fixture" is something substantially affixed to the land, but which may afterward be lawfully removed therefrom by the party affixing it, or his representative, without the consent of the owner of the freehold. *Prescott* v. *Wells*, 3 Nev. 82; *Pickerell* v. *Carson*, 8 Iowa, 544; *State* v. *Bonhan*, 18 Ind. 231; *Barclay*, *Ex parte*, 5 De G., M. & G. 403. In other words, "fixtures" are articles which were originally personal chattels, and which, although they have been annexed to the freehold. by a temporary occupier, are nevertheless removable, and, of course, saleable, at the will of the person who has annexed them. *Hallen* v. *Runder*, 1 Cr. M. & R. 266; *Elliott* v. *Bishop*, 10 Exch. 508; *Capen* v. *Peckham*, 35 Conn. 88. Fixtures of this kind have been held in numerous adjudged cases in the United States to be personal property, even while attached to the soil. As they are the personal property of the party attaching them to the soil before they become fixtures, and

as he has the right to remove them at any time and again convert them into personal property, some courts have seen proper to hold them all the time as such. *Russell* v. *Richards*, 10 Me. 429; *Ashmun* v. *Williams*, 8 Pick. 402; *Tift* v. *Horton*, 53 N. Y. (8 Sick.) 377; 13 Am. Rep. 537; *Voorhees* v. *McGinnis*, 48 N. Y. (3 Sick.) 278. In these cases the courts call the things which are the subject of litigation personal property, although they are technically fixtures; that is, things attached to the land, but with a privilege on the part of some one other than the owner of the land to remove them.

In many cases questions of great nicety must, however, arise, where it is difficult to determine with any degree of satisfaction whether a chattel has lost its natural character by annexation to real property or not; and many rules have been laid down in the books to determine these questions. One rule prevails where the question arises between grantor and grantee, or executor and heir, and another between landlord and tenant, and still another between the executor of a tenant for life and the remainder-man or reversioner, and in such cases the question turns, not upon the character of the annexations and considerations connected therewith, but upon the relation of the party making the annexation to the thing annexed. And even in cases of landlord and tenant, a distinction is made between cases where the article is affixed for the purposes of agriculture, and those where the same thing is done for purposes of trade or manufacture.

In a number of well-considered cases the true criterion of a fixture has been stated to be the united application of three requisites:

First. Actual annexation to the realty, or something appurtenant thereto.

Second. Application to the use or purpose to which that part of the realty with which it is connected is appropriated.

Third. The intention of the party making the annexation to make a permanent accession to the freehold. *Teaff* v. *Hewitt*, 1 Ohio St. 511, 529; *Potter* v. *Cromwell*, 40 N. Y. (1 Hand) 287, 296; *McRea* v. *Central Nat. Bank*, 66 N. Y. (21 Sick.) 489; 50 How. (N. Y.) 51; *Winslow* v. *Merchants' Ins. Co.*, 4 Metc. (Mass.) 314.

It is, therefore, regarded as essential to constitute a fixture, that an article should not only be annexed to the freehold, but that it should clearly appear from an inspection of the property itself, taking into consideration the character of the annexation, the nature and the adaptation of the article annexed to the uses and purposes to which that part of the building was appropriated at the time the annexation was made, and the relation of the party making it to the property in question, that a permanent accession to the freehold was intended to be

made by the annexation of the article. *Capen* v. *Peckham*, 35 Conn. 88.

The law makes a presumption in the case of any one making such annexation, and it is different as the interest of the person in the land is different; that is, whether it is *temporary* or *permanent*. The law presumes that because the interest of a tenant in the land is temporary that he affixes for himself, with a view to his own enjoyment during his term, and not to enhance the value of the estate (*Teaff* v. *Hewitt*, 1 Ohio St. 511, 531; *Whiting* v. *Brastow*, 4 Pick. 311); hence it permits annexation made by him to be detached during his term, if done without injury to the freehold and in agreement with known usages. Id. The law presumes that because the interest of the vendor of real estate, who is the owner of it, has been permanent, that he has made annexations, for himself, to be sure, but with a view to a lasting enjoyment of his estate, and for its continued enhancement in value. So the mortgagor of land is the owner of it, and has a permanent interest therein, and the law presumes that the improvements which he makes thereon by the annexation of chattels he makes for himself, for prolonged enjoyment and to enhance permanently the value of the estate. *Tifft* v. *Horton*, 53 N. Y. (8 Sick.) 377; 13 Am. Rep. 937; *Winslow* v. *Merchants' Ins. Co.*, 4 Metc. (Mass.) 314. See *Kinsey* v. *Bailey*, 9 Hun N. Y.), 452; *Linahan* v. *Barr*, 41 Conn. 471; *Hill* v. *Wentworth*, 28 Vt. 428; *Hill* v. *Sewald*, 53 Penn. St. 271.

The rule requiring actual or physical annexation to the realty is not affected by the few articles sometimes said to belong to the realty upon the principle of constructive annexation, but which are not in fact fixtures, but mere incidents to the freehold, and pass with it upon a different principle from that of a fixture. See *Elliott* v. *Bishop*, 10 Exch. 509. In general, the extent and mode of the annexation must depend much upon the nature of the article itself, the use to which it is applied, and other attending circumstances. *Harkness* v. *Sears*, 26 Ala. 493; *Trull* v. *Fuller*, 28 Me. 545; *Wadleigh* v. *Janvrin*, 41 N. H. 503; *Teaff* v. *Hewitt*, 1 Ohio St. 511, 532; *Snedeker* v. *Warring*, 12 N. Y. (2 Kern.) 170. And the old notion of a "physical attachment" being essential to the determination of the question of fixture or not a fixture, is held to be exploded in Pennsylvania. *Meig's Appeal*, 62 Penn. St. 28, 33; S. C., 1 Am. Rep. 372.

§ 2. **What are fixtures.** What particular things are fixtures is always a mixed question of law and fact (*Campbell* v. *O'Neill*, 64 Penn. St. 290; *Saint* v. *Pilley*, L. R., 10 Exch. 137; S. C., 12 Eng. R. 577; *Gresham* v. *Taylor*, 55 Ala. 505; *Lodge of Masons* v. *Knox*, 27 Mo. 315); and juries should be enabled to decide it by a clear

explanation of the legal meaning of the word. Id. A thing or article may have been regarded as a fixture under one state of facts, and the same thing has been held not to be a fixture under another state of facts. Thus, for instance, the article of manure, where by the sale of agricultural lands, and whether in heaps or scattered in the barnyard, is a fixture, and passes as part of the realty to the vendee (*Goodrich* v. *Jones*, 2 Hill [N. Y.], 142; *Daniels* v. *Pond*, 21 Pick. 367; *Wing* v. *Gray*, 36 Vt. 261; *Gallagher* v. *Shipley*, 24 Md. 418; *Perry* v. *Carr*, 44 N. H. 118); but when upon lands in a village or city, where the lands are not used for agricultural purposes, it is not a fixture, and is treated as personal property. See *Lassell* v. *Reed*, 6 Me. 222; *Plumer* v. *Plumer*, 30 N. H. 558; *Fletcher* v. *Herring*, 112 Mass. 382. It will, therefore, be found, upon examination, that, in determining the question whether a thing is a chattel or a fixture, reference must be had to the nature of the thing itself, the position of the party placing it where found, the probable intention in putting it there, the injury that would result from its removal, and the object of the party in placing it on the premises, with reference to trade, agriculture, or ornament. *Richardson* v. *Borden*, 42 Miss. 71; 2 Am. Rep. 595; *Perkins* v. *Swank*, 43 id. 349; *McRae* v. *Central Nat'l Bank*, 50 How. (N. Y.) 51; *Green* v. *Phillips*, 26 Gratt. (Va.) 752; 21 Am. Rep. 323; *Eaves* v. *Estes*, 10 Kans. 314; 15 Am. Rep. 345; *Potts* v. *New Jersey Arms, etc., Co.*, 17 N. J. Eq. 395. Gravestones, when erected, are fixtures. *Sabin* v. *Harkness*, 4 N. H. 415. Windows in a dwelling-house are fixtures. *State* v. *Elliott*, 11 N. H. 540.

§ 3. **What are not fixtures.** There are some matters which have their foundation in things real, which are, nevertheless, by the principles of the common law, attended with some of the qualities of things personal, and, therefore, termed chattels real. Such are estates less than freehold, easements, rents, emblements, etc. These, however, are easily identified, and have no connection with fixtures. And, again, there are others which, though movable in their nature and apparently falling within the definition of things personal, are, in respect of their legal qualities, of the nature of things real. In this class are heir-looms and things in the nature of heir-looms, which, by special custom, pass with the inheritance; also, animals, *feræ naturæ*, not domesticated, so as to fall under the denomination of chattels, yet so confined to the realty as to become appurtenant to it — as, deer in a park, pigeons in a pigeon-house, conies in a warren, fish in a pond, etc. Also, articles sometimes called fixtures on the principle of constructive attachment, such as the deeds and other papers which constitute the muniments of title to the land, the keys of a house, etc., which belong to the realty

and pass with it, not upon the principle of fixtures, but upon the principle of being necessary and essential incidents to it, and of no value abstracted from it. See *Teaff* v. *Hewitt*, 1 Ohio St. 526; *Ripley* v. *Paige*, 12 Vt. 353; *Elliott* v. *Bishop*, 10 Exch. 507; *Liford's Case*, 11 Co. 50; *Lord* v. *Wardle*, 3 Bing. N. C. 680; *Lord Petre* v. *Heneage*, 12 Mod. 520. None of these articles acquire their legal qualities upon the principle of a fixture.

§ 4. **Contracts as to fixtures.** It is now a well-settled doctrine that the general law governing fixtures may be changed by the express agreement of the parties. See *Shell* v. *Haywood*, 16 Penn. St. 523; *Crippen* v. *Morrison*, 13 Mich. 23; *Hunt* v. *Bay State Iron Co.*, 97 Mass. 279; *Bartholomew* v. *Hamilton*, 105 id. 239; *Haven* v. *Emery*, 33 N. H. 66; *Elliott* v. *Bishop*, 10 Exch. 496; S. C., 11 id. 113; *Kinsey* v. *Bailey*, 9 Hun (N. Y.), 452, 456. And where the question arises between landlord and tenant it should always be ascertained whether they have executed a lease with covenants concerning fixtures. See *Mansfield* v. *Blackburne*, 6 Bing. N. C. 426; *Naylor* v. *Collinge*, 1 Taunt. 21; *Wilson* v. *Whately*, Johns. & H. 426. The limitation of the doctrine is when the subject or mode of annexation is such as that the attributes of personal property cannot be predicated of the thing in controversy, as when the property cannot be removed without practically destroying it, or when it, or part of it, is essential to the support of that to which it is attached. *Ford* v. *Cobb*, 20 N. Y. (6 Smith) 344; *Tifft* v. *Horton*, 53 N. Y. (8 Sick.) 377; 13 Am. Rep. 537.

§ 5. **Trade.** The rule in regard to trade fixtures is made very liberal in favor of the tenant, in order to allow him to remove whatever he places upon, or even temporarily annexes to, the freehold for more convenient use; while in favor of the grantee or mortgagee these trade fixtures are held to pass. *Climie* v. *Wood*, L. R., 3 Exch. 257; *Capen* v. *Peckham*, 35 Conn. 88; S. C., 9 Am. Law Reg. (N. S.) 136. The right of the tenant to remove trade annexations or fixtures was definitely settled in a case before Lord Holt in Queen Anne's reign; and in that case it was laid down, among other things, that during the term a soap-boiler might well remove the vats he sat up in relation to trade, and that he might do it by the common law (and not by virtue of any special custom) in favor of trade and to encourage industry. But, after the term, they became a gift in law to him in the reversion and are not removable. *Poole's Case*, 1 Salk. 368. This case was followed by many others, asserting the same exception and grounding it on the same reason—namely, the encouragement afforded to trade by public policy. See 2 Smith's Lead. Cas. 241; see, also, the American

cases of *Weathersby* v. *Sleeper*, 42 Miss. 732; *Thomas* v. *Crout*, 5 Bush (Ky.), 37; *Seeger* v. *Pettit*, 77 Penn. St. 437; S. C., 18 Am. Rep. 452; but see *Treadway* v. *Sharon*, 7 Nev. 37. And it is held that although a building may be raised on a brick foundation and have a brick chimney, yet if the erection on such foundation is of wood and the building is used for the purpose of trade and manufacture, the tenant may remove it at the end of his term. *Penton* v. *Robart*, 4 Esp. 33; S. C., 2 East, 88; see, also, *O'Donnell* v. *Hitchcock*, 118 Mass. 401. But buildings of brick, with brick foundations let into the soil, although erected for the sole purpose of trade, cannot be removed by the tenant, while machinery, engines, vats, and utensils, with their accessories, may be removed. *Whitehead* v. *Bennett*, 27 L. J. Ch. 474. So, it has been held, that furnaces, cider-mills, buildings resting on blocks, salt-pans, platform-scales, factory machines, and many other things of like nature are removable by the out-going tenant. See *Holmes* v. *Tremper*, 20 Johns. 29; *Swift* v. *Thompson*, 9 Conn. 63; *Taffe* v. *Warnick*, 3 Blackf. (Ind.) 111; *Gaffield* v. *Hapgood*, 17 Pick. 192; *Lanphere* v. *Lowe*, 3 Neb. 131; *Graves* v. *Pierce*, 53 Mo. 423; *Hanrahan* v. *O'Reilly*, 102 Mass. 201; *Hayes* v. *New York. Min. Co., etc.*, 2 Col. T. 273. And the right of a tenant to remove a trade fixture may be extended beyond his term or possession by an agreement with the landlord. *Torrey* v. *Burnett*, 38 N. J. Law, 457; 20 Am. Rep. 421.

The exercise of the right to remove trade fixtures is, however, restricted by the rule, that the principal thing shall not be destroyed by the accessory. *Lawton* v. *Lawton*, 3 Atk. 15. And it may perhaps be deduced from this, that, if a trading fixture could not be removed without the destruction or great and serious injury of some important building, it would be irremovable. 2 Smith's Lead. Cas. 241; *Wall* v. *Hinds*, 4 Gray, 270. Counter-shafting, pulleys, hangers, and belts fastened to the building with bolts, also a portable boiler and steam-pipes supported by hooks screwed to the building, were held to be either trade fixtures or personal chattels, removable by the lessee who put them in. *Holbrook* v. *Chamberlin*, 116 Mass. 155; S. C., 17 Am. Rep. 146. So, bowling alleys in a room leased for hall purposes were held to be trade fixtures which the lessee might remove, though to do so would injure the building. *Hanrahan* v. *O'Reilly*, 102 id. 201. Likewise, a glass case, a stand of drawers and a large mirror bought by the tenant of a restaurant, to use in his business, and screwed or nailed to the ceiling, also, "gas fixtures" screwed upon gas-pipes fastened to the ceiling, were held not to be fixtures. *Guthrie* v. *Jones*, 108 id. 191. And see *Brown* v. *Wallis*, 115 id. 156. But a bar, bar fixtures, cupboard, bowling alleyways and racks, attached by a ten-

ant to a building occupied by him as a saloon under a lease, so annexed to the freehold as to belong to it, are held to be permanent fixtures and to become the property of the landlord, and cannot be removed by the tenant or his vendee. *O'Brien* v. *Kusterer*, 27 Mich. 289 ; see, also, *Guthrie* v. *Janes*, 108 Mass. 191.

As to the subject of fixtures in general, between landlord and tenant, see *post*, § 19.

§ 6. **Agriculture.** The right of the tenant to remove annexations made for the purposes of trade and manufactures has not generally been extended to erections or annexations for agricultural purposes. Thus in the leading case of *Elwes* v. *Mawe*, 3 East, 38 ; S. C., 2 Smith's Lead. Cas. 228, a tenant in agriculture, who had erected at his own expense, and for the more necessary and convenient occupation of his farm, a number of substantial buildings, was not permitted to remove them, though during his term, and though they thereby left the premises in the same state as when he entered ; for the reason that annexations for trade purposes should be distinguished from annexations for purposes of agriculture. See, also, *Williams* v. *Williams*, 12 East, 209 ; *Buckland* v. *Butterfield*, 2 B. & B. 58. It has, however, been questioned, whether the English doctrine was applicable to the circumstances of this country (*Van Ness* v. *Packard*, 2 Pet. [U. S.] 137); and it was held, that a wooden building erected by a tenant, with a view to carry on the business of dairying, might be removed by him during the term, although it was two stories high in front, with a shed of one story, a cellar of stone or brick foundation, and a brick chimney, and was occupied by his family and servants who assisted in the dairy business. Id. And see *Perkins* v. *Swank*, 43 Miss. 349, 361. In Massachusetts, the rule applicable to trade fixtures was extended to an agricultural tenant (*Whiting* v. *Brastow*, 4 Pick. 310); and so, in a case in New York, *Dubois* v. *Kelly*, 10 Barb. 496. But see *Ombony* v. *Jones*, 19 N. Y. (5 Smith) 234. And it would seem that the question in respect to strictly agricultural fixtures, as between landlord and tenant, has not been fully settled by the authorities in this country. *Merritt* v. *Judd*, 14 Cal. 59 ; *Harkness* v. *Sears*, 26 Ala. 493 ; *Pemberton* v. *King*, 2 Dev. (N. C.) 376 ; *Leland* v. *Gassett*, 17 Vt. 410.

If, however, the thing in dispute is so constructed as not to become affixed to the land or a building, it is a mere chattel, and would be held removable as between landlord and tenant both by the American and the English decisions. Thus, a barn erected by a tenant, upon pattens and blocks of wood lying on the ground, might always be removed by him. *Anthony* v. *Haneys*, 8 Bing. 186 ; *Smith* v. *Benson*, 1 Hill (N. Y.), 176. So, posts and boards on a farm will be regarded as personal

property, if there is nothing to show that they are kept for the purpose of fencing, so as to convert them into realty (*Wing* v. *Gray*, 36 Vt. 261); and an outgoing tenant has a right to take away hop-poles, which he has placed in the soil for a temporary use and with intent to remove them, as against both the landlord and the landlord's grantee. Id. A gin stand, not attached to the realty, though used for the purpose of the farm, is not a fixture; nor is a bell, though used for farm purposes, when it is only set upon posts, and not permanently affixed. *Cole* v. *Roach*, 37 Tex. 413. See *Weston* v. *Weston*, 102 Mass. 514.

Ordinarily, a farmer, who sets out fruit-trees, cannot sell and remove them without the landlord's consent. *Lee* v. *Risdon*, 7 Taunt. 188. But trees planted by the owner or tenant of the soil, for the purpose of transplanting and sale, are treated constructively at law as personal chattels; and a gardner or nurseryman, who occupies premises under a lease, may, therefore, at the end of his term, remove and dispose of the trees and shrubs which he has planted in the course of business. *King* v. *Wilcomb*, 7 Barb. 263; *Brooks* v. *Galster*, 51 id. 196; *Miller* v. *Baker*, 1 Mete. (Mass.) 127; *Maples* v. *Millon*, 31 Conn. 598; *Price* v. *Brayton*, 19 Iowa, 309. And he may also remove green-houses and hot-houses erected by him as tenant of the premises, for the purpose of carrying on his business. *Penton* v. *Robart*, 2 East, 88; *Syme* v. *Harvey*, 24 Scotch Sess. Cas. 202. But see *Jenkins* v. *Gething*, 2 Johns. & H. 520; *Fisher* v. *Dixon*, 12 Cl. & Fin. 312.

As a general rule, in this country, manure made upon a farm from the consumption of its products is regarded as real estate, and the tenant may not remove it. *Lewis* v. *Jones*, 17 Penn. St. 262; *Fay* v. *Muzzey*, 13 Gray, 53. But in England, and in some of the United States, the rule is otherwise. *Roberts* v. *Barker*, 1 Cr. & M. 809; *Smithwick* v. *Ellison*, 2 Ired. (N. C.) 326; *Ruckman* v. *Outwater*, 4 Dutch. (N. J.) 581. And see *ante*, 370, § 2.

§ 7. **Things useful or ornamental.** In respect to fixtures put up for purposes of ornament or convenience, the right of the tenant to remove them was expressly denied in some of the old cases. *Herlakenden's case*, 4 Co. 64; *Poole's case*, 1 Salk. 368. But whatever may have been the early rule, it has been long since settled that there are many ornamental and useful fixtures which the tenant is entitled to remove. Among these may be mentioned hangings and looking-glasses (*Beck* v. *Rebow*, 1 P. Wms. 94), tapestry (*Harvey* v. *Harvey*, Str. 1141; *Lee* v. *Risdon*, 7 Taunt. 188), wainscot (*Lawton* v. *Lawton*, 3 Atk. 15), ornamental chimney-pieces (*Leach* v. *Thomas*, 7 C. & P. 328; *Bishop* v. *Elliot*, 11 Exch. 113), stoves and grates fixed into the chimney with brickwork, and cupboards supported by hold-

fasts (*Rex* v. *St. Dunstan*, 4 B. & C. 686), cooking-coppers, mash-tubs, blinds, and the like. *Colegrave* v. *Dias Santos*, 2 id. 76. And see *Elwes* v. *Mawe*, 3 East, 38; *Wall* v. *Hinds*, 4 Gray, 256; *Peck* v. *Batchelder*, 40 Vt. 233. A pump erected by a tenant, and so fixed as to be removable without injury to the freehold, may be taken away by him at the expiration of his term, as being an article of domestic use or convenience. *McCracken* v. *Hall*, 7 Ind. 30; *Grymes* v. *Boweren*, 6 Bing. 437. But a tenant (not a gardener by trade) cannot remove a border of box, planted by himself on the premises demised, unless by special agreement with the landlord. *Empson* v. *Soden*, 4 B. & Ad. 655; S. C., 1 N. & M. 720. And a conservatory erected on a brick foundation, affixed to and communicating with rooms in a dwelling-house by windows and doors, cannot be removed by a tenant for years, who erected it during his tenancy, although he had a reversion in fee after the death of his lessor. *Buckland* v. *Butterfield*, 2 B. & B. 54; S. C., 4 Moore, 440. As between grantor and grantee, a statue erected as an ornament to grounds may be a part of the realty, although it is not fastened to the base on which it rests, and can be removed without fracture (*Snedeker* v. *Warring*, 12 N. Y. [2 Kern.] 170); but if it were a question arising between landlord and tenant, such an ornament would probably be held to be removable. See id. 174.

A wooden ice-house of 2,000 tons capacity, built on leased land, on no foundations except wooden blocks, was held to be removable by the lessee. *Antoni* v. *Belknap*, 102 Mass. 193. And marble slabs not screwed to the brackets are removable by a grantor on quitting premises occupied by him as tenant of his grantee. *Weston* v. *Weston*, id. 514.

Lamps, chandeliers, candlesticks, candelabra, sconces, and the various contrivances for lighting houses by means of candles, oil, or other fluids, have never been considered as irremovable fixtures, and as forming a part of the freehold. There is said to be no trace of a contrary doctrine in the English decisions, nor does it appear that the ordinary apparatus for lighting has ever been classed among fixtures in this country. *Vaughen* v. *Haldeman*, 33 Penn. St. 522. So, it is well settled that "gas fixtures," as they are called, although fastened to the building, are not fixtures, as between the landlord and tenant, and may be removed by the latter (*Lawrence* v. *Kemp*, 1 Duer [N. Y.], 363; *Shaw* v. *Lenke*, 1 Daly [N. Y.], 487; *Wall* v. *Hinds*, 4 Gray, 256; *Montague* v. *Dent*, 10 Rich. [S. C.] 135; *Jarechi* v. *Philharmonic Society*, 79 Penn. St. 403; *Rogers* v. *Crow*, 40 Mo. 91); and so of a gasometer and an apparatus for generating gas. *Hays* v. *Doane*, 11 N. J. Eq. 84. So, gas stoves are largely used for bath and other

rooms, which are necessarily connected with the gas pipes in the same way as ordinary burners, and these have never been thought to be fixtures attached to the realty, which it would be waste for the tenant to remove. It is, therefore, considered more simple to regard all these gas fixtures, whether stoves, chandeliers, hall and entry lamps, drop-lights, or table-lights, as governed by the same rule as the articles for which they are substituted, and so removable by the tenant. *Vaughen* v. *Haldeman*, 33 Penn. St. 522. Water and gas pipes laid in the ground are generally considered fixtures belonging to the realty. *Providence Gas Co.* v. *Thurber*, 2 R. I. 15; *Philbrick* v. *Ewing*, 97 Mass. 133.

§ 8. **Machinery in buildings.** The true rule in determining what are fixtures in a manufacturing establishment, where the land and buildings are owned by the manufacturer, is in a recent case stated to be, that where the machinery is permanent in its character, and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential to the purposes for which the building is used will be considered as a fixture, although the connection between them be such that it may be severed without physical or lasting injury to either. *Green* v. *Phillips*, 26 Gratt. (Va.) 752; 21 Am. Rep. 323. In other words, it is the permanent and habitual annexation, and not the manner of fastening, that determines when personal property becomes part of the realty. *Brennan* v. *Whitaker*, 15 Ohio St. 446; *Laflin* v. *Griffiths*, 35 Barb. 58; *McRea* v. *Central Nat'l Bank*, 66 N. Y. (21 Sick.) 489; 50 How. (N. Y.) 51; *Pierce* v. *George*, 108 Mass. 82; *Parsons* v. *Copeland*, 38 Me. 537. Steam engines, which supply the motive power of machinery, boilers, a water-wheel, and the shafting and gearing of a mill or factory, and the saws and cranks of a saw-mill, have, in numerous instances, been held to be fixtures, and not personal chattels. *Voorhees* v. *McGinnis*, 48 N. Y. (3 Sick.) 278; *Hill* v. *Hill*, 43 Penn. St. 521; *Citizens' Bank* v. *Knapp*, 22 La. Ann. 117; *McKim* v. *Mason*, 3 Md. Ch. 186; *Davenport* v. *Shants*, 43 Vt. 546; *Peirce* v. *George*, 108 Mass. 78; *Burnside* v. *Twitchell*, 43 N. H. 390; *Trull* v. *Fuller*, 28 Me. 545. And as between mortgagor and mortgagee of a large brick building, certain boilers, engines, shafting and steam pipes for heating purposes, the latter fastened along the walls with wrought iron spikes, were held to be part of the realty, although called personal property in a deed and bill of sale to the mortgagor. *Quinby* v. *Manhattan Cloth, etc., Co.*, 24 N. J. Eq. 260. Cotton gins secured by the usual method are fixtures. *Latham* v. *Blakely*, 70 N. C. 369; *Bratton* v. *Clawson*, 2 Strobh. (S. C.) 478; *Richardson* v. *Borden*, 42 Miss. 71;

2 Am. Rep. 595. And machinery set in bricks and run by steam, and used as a cotton seed oil factory, constitutes a part of the realty on which it is erected. *Theurer* v. *Nantre*, 23 La. Ann. 749. So, machinery in a sash and blind factory attached to the building by spikes, bolts and screws, and operated by belts running from the permanent shafting driven by the water-wheel under the mill or factory, becomes a part of the realty. *Symonds* v. *Harris*, 51 Me. 14. Platform scales set into the earth in front of a building, and connected with a room in it, to which the weighing apparatus is firmly attached, are a fixture as between landlord and tenant. *Bliss* v. *Whitney*, 9 Allen, 114. Likewise, a factory bell and a blower pipe conveying air from a blower to a forge were held to be parts of the realty. *Alvord, etc., Manuf. Co.* v. *Gleason*, 36 Conn. 86. And a very heavy carding machine, run by water power, but not fastened to the building, was held to be a fixture, and, in the absence of any showing to the contrary, to pass with the land. *Deal* v. *Palmer*, 72 N. C. 582.

But movable machines, whose number and permanency are contingent on the varying circumstances of business, subject to its fluctuating conditions and liable to be taken in or out, as exigencies may require, are different in nature and legal character from steam engines, boilers and other articles mentioned above as being indispensable to the enjoyment of the freehold. *Rogers* v. *Brokaw*, 25 N. J. Eq. 496. With respect to the former, they are usually regarded, both in England and in this country, as personal property. See, generally, *Voorhees* v. *McGinnis*, 48 N. Y. (3 Sick.) 278, 286; *Childress* v. *Wright*, 2 Coldw. (Tenn.) 350; *Fullam* v. *Stearns*, 30 Vt. 443; *Swift* v. *Thompson*, 9 Conn. 63; *Wade* v. *Johnston*, 25 Ga. 331; *Hill* v. *Sewald*, 53 Penn. St. 274; *Waterfall* v. *Penistone*, 6 El. & Bl. 876; *Hellawell* v. *Eastwood*, 6 Exch. 245, 312; *Turner* v. *Cameron*, L. R., 5 Q. B. 306. Thus the machinery in a woolen or cotton factory is generally deemed personalty. *Murdock* v. *Gifford*, 18 N. Y. (4 Smith) 28; *Taffe* v. *Warnick*, 3 Blackf. (Ind.) 111; *Graves* v. *Pierce*, 53 Mo. 423. So of stills set up in furnaces, in the usual manner for making whisky (*Moore* v. *Smith*, 24 Ill. 512; *Burk* v. *Baxter*, 3 Mo. 207; *Terry* v. *Robins*, 13 Miss. 291. But see *Bryan* v. *Lawrence*, 5 Jones' [N. C.] Law, 337; *Feimster* v. *Johnston*, 64 N. C. 259); machinery for spinning flax and tow (*Cresson* v. *Stout*, 17 Johns. 116); a stone for grinding bark, affixed to a mill called a bark mill (*Heermance* v. *Vernoy*, 6 id. 5); a kettle or boiler put up in a tannery with brick and mortar, unless there was something to show that it was intended to be a fixture (*Hunt* v. *Mullanphy*, 1 Mo. 508. But see *Union Bank* v. *Emerson*, 15 Mass. 159); also leather fastened to a bench by screws, grind-

stones resting upon frames standing upon the floor, anvils, vises, or a portable forge. *Pierce* v. *George*, 108 Mass. 78; 11 Am. Rep. 310. So a moulding machine and a planing machine, placed in a sash and blind factory, one of which was bolted to the floor for greater firmness, and the other left standing without fastenings, were held to be personal chattels in *Blancke* v. *Rogers*, 26 N. J. Eq. 563. And where the property in dispute were certain pieces of machinery known as "jibs," which, when fixed into their places in a building in connection with other machinery, might be taken out without injury to the building or connecting machinery, but not without some injury to themselves, it was the opinion of the court of king's bench in England that these jibs, from their mode of construction, were not fixtures, but personal chattels. *Davis* v. *Jones*, 2 B. & A. 165, 167.

In this connection it may be stated that realty may be converted into personalty by a mere agreement (*Harlan* v. *Harlan*, 20 Penn. St. 303), and whether a thing be attached to the realty or not, or in whatever manner attached, is immaterial when the parties agree to consider it personal property. *Coleman* v. *Lewis*, 27 id. 291; *Shell* v. *Haywood*, 16 id. 530. And see *ante*, 372, § 4.

§ 9. **Railroad rolling stock.** The materials used in the construction of a railway become annexed to the soil in the process of construction, and a railway track is, therefore, deemed a fixture. *Strickland* v. *Parker*, 54 Me. 263; *North. Cent. R. R. Co.* v. *Canton Co.*, 30 Md. 347; *Turner* v. *Cameron*, L. R., 5 Q. B. 306; *Farmers', etc., Co.* v. *Hendrickson*, 25 Barb. 488. Thus, a railroad track laid down upon land, with a view to its permanent improvement or beneficial enjoyment, is a fixture and part of the realty. *Van Keuren* v. *Cent. R. R. Co.*, 38 N. J. Law, 165; *Turner* v. *Cameron*, L. R., 5 Q. B. 306. So a marine railway, consisting of iron and wooden rails and sleepers, endless chain, gear, wheels and ship cradle, and constructed in the usual manner, is a fixture. *Strickland* v. *Parker*, 54 Me. 263.

But it is settled in the State of New York that the rolling stock of a railway company, such as cars, locomotives, tenders, etc., constitute personal property, and are not a part of realty. *Randall* v. *Elwell*, 52 N.Y. (7 Sick.) 521; 11 Am. Rep. 747; *Hoyle* v. *Plattsburgh, etc., R. R. Co.*, 54 N.Y. (9 Sick.) 314; 13 Am. Rep. 595. In a few of the other States an opposite rule would seem to be established, but the precise question cannot yet be regarded as definitely settled. See *Palmer* v. *Forbes*, 23 Ill. 300; *State* v. *Northern R. R. Co.*, 18 Md. 193; *Minnesota* v. *St. Paul Co.*, 2 Wall. (U. S.) 609, 645, note.

§ 10. **Heir and executor.** As between heir and executor the rule obtains with the most rigor in favor of the inheritance, and against the

right to disannex therefrom, and to consider as a fixture any thing which has been affixed thereto. *Elwes* v. *Maw*, 3 East, 38; S. C., 2 Smith's Lead. Cas. 240; *Harkness* v. *Sears*, 26 Ala. 493. And although the strictness of this rule was subsequently relaxed to some extent in favor of trade (see *ante*, 372, § 5), yet the doctrine of the later English cases is, that the encouragement to trade is not applicable to questions ordinarily arising between heir and executor with respect to fixtures. *Mather* v. *Fraser*, 2 Kay & J. 536; *Fisher* v. *Dixon*, 12 Cl. & Fin. 312. In the latter case the decision was, that, in the absence of any disposition by the absolute owner of land, of machinery erected by him upon and affixed to the freehold, it will go to the heir as part of the real estate. Also, if the *corpus* of such machinery belongs to the heir, all that belongs to that machinery, although more or less capable of being detached from it, and more or less capable of being used in such detached state, must also be considered as belonging to the heir. Moreover, no distinction arises in the application of this rule from the circumstance that the land did not descend to, but was purchased by the owner. Id.

The rule, though not as definitely settled in this country as in England, is, however, believed to be quite as strict and in favor of the heir in the absence of any statutory enactment in favor of the executor See *Fay* v. *Muzzey*, 13 Gray, 53; *Bainway* v. *Cobb*, 99 Mass. 457; *Buckley* v. *Buckley*, 11 Barb. 43; *Doak* v. *Wiswell*, 38 Me. 569; R. I. Gen. Stats. 1872, ch. 39, § 3; 2 N. Y. Rev. Stats. 82, 83, §§ 6, 7. As to emblements, see *ante*, Vol. 2, 221. In an early case in Massachusetts it was held that corn or any other product of the soil, raised annually, by labor and cultivation, is personal estate, and would go to the executor and not to the heir, on the decease of the proprietor. *Penhallow* v. *Dwight*, 7 Mass. 34. But growing fruit-trees and fences inclosing a field are fixtures, and as such belong to the freehold. *Mitchell* v. *Billingsley*, 17 Ala. 391; *Osborn* v. *Rabe*, 67 Ill. 108.

§ 11. **Heir and devisee.** The rule as between heir and devisee is that a testator may devise such fixtures as are severable from the freehold, and which would go to his personal representative to the exclusion of the heir; but if the estate itself be not devisable, things which are attached to it will not pass under a devise of them. See *Liford's Case*, 11 Co. 506; 1 Schoul. Pers. Prop. 151. It is therefore held, that if a tenant for life, or in tail, devise fixtures, his devise is void, he having no power to devise the realty to which they are incident (Shep. Touchst. 469, 470; *Herlakenden's Case*, 4 Co. 62); unless, indeed, they be such things as would pass to his executor. See *Colegrave* v. *Dias Santos*, 2

B. & C. 80; 2 Smith's Lead. Cas. 248. On the other hand, the rights of the devisee of lands against the executor of the devisor would seem, on principle, to be the same as those of the heir in whose place the devisee stands Id.

§ 12. **Life-tenant and remainderman.** As between the executor of a tenant for life or in tail and a remainderman, the law favors the soil rather less and the representative desiring to disannex rather more. And in two early cases of this kind which came before Lord Chancellor HARDWICKE, he permitted, in both of them, a steam or fire engine erected in a colliery, to go as assets to the executor of a life-tenant. *Dudley* v. *Warde*, Ambl. 113; *Lawton* v. *Lawton*, 3 Atk. 13. And the doctrine has been subsequently approved. See *Elwes* v. *Maw*, 3 East, 38, 54; S. C., 2 Smith's Lead. Cas. 228; *Lawton* v. *Salmon*, 1 H. Bl. 260, *n.* But it is held, that where such articles as tapestry, marbles, statues, pictures with their frames and glasses, etc., belonging to one tenant for life, remain on the premises detached at his death, the next tenant for life cannot, by attaching them to the freehold, prejudice or affect the rights of his successors. *D'Eyncourt* v. *Gregory*, L. R. 3 Eq. 382.

§ 13. **What removable.** The general maxim of the law is that whatever is fixed to the realty becomes a part of it, and partakes of all its incidents and properties. This is the rule, even in the relation of landlord and tenant. *Ombony* v. *Jones*, 19 N. Y. (5 Smith) 234, 240. But many exceptions have been engrafted upon it, as shown in preceding sections, although the rule itself has not been reversed; and additional illustrations of those exceptions will be here given. A person cannot remove buildings which he voluntarily and without contract erects upon another's land. *Reid* v. *Kirk*, 12 Rich. (S. C.) 54; *Washburn* v. *Sproat*, 16 Mass. 449; *Mudigan* v. *McCarthy*, 108 id. 376; S. C., 11 Am. Rep. 371. But if a house is erected by one man upon the land of another, by his assent and upon an agreement or understanding that the builder may remove it when he pleases, it does not become a part of the real estate, but remains a personal chattel and removable. *Dame* v. *Dame*, 38 N. H. 429; *White's Appeal*, 10 Penn. St. 252. And see *Fuller* v. *Tabor*, 39 Me. 519; *Curtiss* v. *Hoyt*, 19 Conn. 154; *Weathersby* v. *Sleeper*, 42 Miss. 732; *Mills* v. *Redick*, 1 Neb. 437.

In an English case, the executors of a rector were held entitled to remove a hot-house which he had put up in the garden of the rectory, within a reasonable time after his death, although the framework of the structure rested on brick walls. *Martin* v. *Roe*, 7 El. & Bl. 237. And in a New York case, a similar decision was made with reference to a ball-room, which had been built by a lessee for years on stone piers. *Ombony* v. *Jones*, 19 N. Y. (5 Smith) 234. A saw-mill built

upon timbers lying upon the surface of the ground, and constructed with the object and purpose, after sawing the timber within a convenient distance, to be removed to another locality was held to be a mere personal chattel. *Brown* v. *Lillie*, 6 Nev. 244. And see *McDavid* v. *Wood*, 5 Heisk. (Tenn.) 95; *Witherspoon* v. *Nickels*, 27 Ark. 332. And a small building placed on another's land, without cellar, chimney or plastering, and constructed of slight materials, in sections, so as to be easily taken apart without cutting, and resting upon unbroken ground, was held to be a chattel and to be subject to attachment by the creditors of its owner. *O'Donnell* v. *Hitchcock*, 118 Mass. 401. See, also, *Thropp's Appeal*, 70 Penn. St. 395. So, it has been held that a town house, erected on land of the town, under a contract with the builder, that the town should occupy part of it at a certain rent, and should have the right to purchase the house at an appraised value, was the personal property of the builder. *Ashmun* v. *Williams*, 8 Pick. 402.

All improvements on public lands of the United States, which become a part of the realty, pass to the purchaser from the United States. *Collins* v. *Bartlett*, 44 Cal. 371. But this rule has no application to the buildings, fences, etc., erected on public lands, which are not attached to the soil, and are not a part of the realty. And it is held that the United States has no interest in a building set upon blocks resting on the ground, a portable fence standing on the surface of the soil, etc.; and that they do not pass to a purchaser from the United States. The person who constructed them has a right to remove them after a patent has issued to the purchaser. *Pennybecker* v. *McDougal*, 48 Cal. 160.

Where a railroad company entered upon lands, having acquired the right of way, and built thereon stone piers and abutments for a bridge, and subsequently abandoned that portion of its road, it was held that the company might remove such structures as personal property. *Wagner* v. *Cleveland, etc., R. R. Co.*, 22 Ohio St. 563; S. C., 10 Am. Rep. 770. See, also, *Northern Cent. R. R. Co.* v. *Canton Co.*, 30 Md. 347. So, during the war of 1861–65, the United States erected buildings upon a public common, for use during the war. After the war, the government officers offered the buildings for sale, to be removed, and the municipal authorities applied to have the sale restrained, claiming that the buildings were fixtures and must be deemed dedicated to public use upon the common. But it was held that the buildings were not incorporated into the realty, and that the government officers might remove them. *Meig's Appeal*, 62 Penn. St. 28; S. C., 1 Am. Rep. 372.

In a recent case in Pennsylvania, it was held that certain gas fixtures,

platform scales, a walnut stair railing, walnut stairs, bannisters, and closet, erected by the tenants of a drug store, for their own convenience and use, as a general rule, were fixtures belonging to the tenants, and removable by them. *Seeger* v. *Pettitt*, 77 Penn. St. 437; S. C., 18 Am. Rep. 452.

§ 14. **Time of removal.** So far as concerns landlord and tenant, the general rule is stated to be, that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant. *Weeton* v. *Woodcock*, 7 Mees. & W. 14. See, also, *Lyde* v. *Russell*, 1 B. & Ad. 394; *Beers* v. *St. John*, 16 Conn. 322; *Haflick* v. *Stober*, 11 Ohio St. 482; *Dingley* v. *Buffum*, 57 Me. 381. And an outgoing tenant has no right to enter, for the purpose of severing and removing fixtures after the expiration of his term, and a new tenant has been let into possession. *Leader* v. *Homewood*, 5 C. B. (N. S.) 546. And see *Davis* v. *Buffum*, 51 Me. 160; *Burk* v. *Hollis*, 98 Mass. 55; *Davis* v. *Moss*, 38 Penn. St. 346. Nor can the tenant's fixtures be removed after the determination of the lease by the landlord's re-entry for breach of condition. *Pugh* v. *Arton*, L. R., 8 Eq. 626. The rule on the subject seems to have its foundation in the presumption of abandonment arising from the conduct of the tenant. When he quits the premises, leaving his fixtures behind him, it may well be presumed that he intended to abandon them. *Penton* v. *Robart*, 2 East, 88; *DuBois* v. *Kelly*, 10 Barb. 496; *Conner* v. *Coffin*, 22 N. H. 541. This presumption can never arise while the tenant remains in possession. Id. And see *Gaffield* v. *Hapgood*, 17 Pick. 192; *Mason* v. *Fenn*, 13 Ill. 529; *Kutter* v. *Smith*, 2 Wall. 491; *Whipley* v. *Dewey*, 8 Cal. 36. In the case of tenants for life and at will, however, whose terms, from the nature of the tenancy, are of uncertain duration, the above rule is relaxed, and they, or their representatives, have been allowed the right to remove fixtures after the expiration of their term. *Lawton* v. *Lawton*, 3 Atk. 13; *Weeton* v. *Woodcock*, 7 Mees. & W. 14; *Haflick* v. *Stober*, 11 Ohio St. 482; *Ombony* v. *Jones*, 19 N. Y. (5 Smith) 234; *Martin* v. *Roe*, 7 El. & Bl. 237.

So, as between landlord and tenant, this whole subject lies open to agreement, and they may determine between themselves what shall be fixtures and at what time they are to be removed. *McCracken* v. *Hall*, 7 Ind. 30; *Brearley* v. *Cox*, 4 Zabr. (N. J.) 287; *Stansfeld* v. *Mayor of Portsmouth*, 4 C. B. (N. S.) 119; *Saint* v. *Pilley*, L. R., 10 Exch. 137; S. C., 12 Eng. R. 577. And a stipulation that compensation shall be made at the end of the term, for such fixtures as may

be erected during its continuance, may entitle the tenant to remain in possession until the agreement is fulfilled, or to remove the fixtures subsequently, if it be not subject to the obligation of making a reasonable return for the enjoyment of the premises, which may, however, fall short of that fixed by the terms of the lease. *Van Rensselaer* v. *Penniman*, 6 Wend. 569; *Holsman* v. *Abrams*, 2 Duer (N. Y.), 435; *Paine* v. *Trinity Church*, 7 Hun (N. Y.), 89; *Pugh* v. *Arton*, L. R., 8 Eq. 626. Where a landlord agreed to sell a trade fixture for the benefit of the tenant, but failed to do so, it was held that the tenant had a reasonable time to remove such fixture, although his term was ended and possession surrendered. *Torey* v. *Burnett*, 38 N. J. Law, 457; S. C., 20 Am. Rep. 421.

§ 15. **What not removable.** Many articles, really chattels in themselves, are by construction or destination so annexed to the freehold as to be properly regarded as fixtures, or part and parcel of the realty. And whatever has become thus annexed to the realty, though temporarily separated therefrom for convenience in making repairs, or otherwise, still remains a part, and passes by a conveyance thereof, notwithstanding the severance. *Wadleigh* v. *Janvrin*, 41 N. H. 503. Thus, where a building is torn down with the view and intention of remodeling and repairing, by use of the same materials, the character of immovables which the materials have acquired, by being used in the construction of the first building, is not lost, but they continue immovable by destination; because they are intended to be used in the repair or reconstruction of the old building. *Beard* v. *Duralde*, 23 La. Ann. 284. So, if a building be blown down by a tempest, its fragments are not by that act converted into personalty, but pass with the realty to a purchaser at a sheriff's sale. *Rogers* v. *Gilinger*, 30 Penn. St. 185. But a trustee's sale of real estate, wherefrom the improvements had been burned down, was held not to pass fixtures that had been removed during the fire. *Curry* v. *Schmidt*, 54 Mo. 515. And see *Bliss* v. *Misner*, 2 Hun (N. Y.), 391; S. C., 4 N. Y. Sup. (T. & C.) 633. A house brought upon land by a tenant at will, and placed on stone foundations, and over a cellar, without any contract, express or implied, with the land-owner, was held to become a part of the realty. *Madigan* v. *McCarthy*, 108 Mass. 376; 11 Am. Rep. 371. And a building erected by one entering upon the land, under a claim of right adverse to the true owner, is a fixture, notwithstanding the trespasser's intention to remove it. *Huebschmann* v. *McHenry*, 29 Wis. 655.

An iron safe encased in a brick wall, with its foundation laid in brick and mortar or plaster, is held to be a fixture which cannot be recovered by a person claiming it, separate and apart from the buildings and

premises in which it is so located. *Folger* v. *Kenner*, 24 La. Ann. 436. And so of a furnace placed in a dwelling-house for heating purposes (*Main* v. *Schwarzwaelder*, 4 E. D. Smith [N. Y.], 273; *Stockwell* v. *Campbell*, 39 Conn. 362; 11 Am. Rep. 393; *Thielman* v. *Carr*, 75 Ill. 385); or, a stove fastened to the brick-work of a chimney. *Goddard* v. *Chase*, 7 Mass. 432. So, machinery built securely into the wall is, n general, considered a part of the realty. *Coey's Estate*, 1 Tuck. (N. Y.) 125. And see *Capen* v. *Peckham*, 35 Conn. 88. And the counters and drawers in a store are held to be fixtures which the tenant has no right to remove, and if he does remove them, even to save them from destruction by fire, they cease to be fixtures and become personal property, which the landlord may dispose of at his pleasure, the tenant's right to their use having ceased with the severance. *Pope* v. *Garrard*, 39 Ga. 471. See *Brown* v. *Wallis*, 115 Mass. 156; *Tabor* v. *Robinson*, 36 Barb. 483.

But implements of agriculture, such as a cotton gin and press, and a grist mill, that can be detached without injury to the freehold, have been held not to become part of it, so as to prevent one who has the temporary use, or limited right to the land on which they are used, from removing them at pleasure. *Cole* v. *Roach*, 37 Tex. 413; *McJunkin* v. *Dupree*, 44 id. 500.

§ 16. **Preventing removal.** The remedy by an action at law for injuries done to the freehold by the removal of fixtures is slow and frequently inadequate. Courts of equity, therefore, in many cases interpose their aid by means of an injunction; but relief by this means will not be granted on slight or uncertain grounds, and it must be made to appear that there has been actual waste, or some act from which the intention to commit waste is fully evinced. See *Gibson* v. *Smith*, 2 Atk. 183; *Hanson* v. *Gardiner*, 7 Ves. 309; *Keogh* v. *Daniell*, 12 Wis. 163. Where a lessee began to pull down and remove a brick building on the land, an injunction was ordered, with damages. *Jungerman* v. *Bovee*, 19 Cal. 354. So, a perpetual injunction was granted against the removal of greenhouses built in a garden, and constructed of wooden frames fixed with mortar to foundation walls of brick-work. *Bidder* v. *Trinidad Petroleum Co.*, 17 W. R. 153. And an injunction was likewise granted to restrain the purchaser of boilers supported by brick-work from removing them and other trade fixtures. *Jenkins* v. *Gitting*, 2 Johns. & Hem. 520. And it was held by the supreme court of Illinois, that where a vendor of land undertakes to remove and take away nursery trees under a verbal reservation of them upon sale of the land, he may be restrained from doing so by injunction. *Smith* v. *Price*, 39 Ill. 28. An injunction against waste will not,

however, be granted, where the article in question is a mere movable fixture, and not annexed to the freehold; as for instance, in case of a dove-cote, and the removal of locks from the doors of a house, the chains from a lawn, the statues, images and fences from the pleasure ground, or wardrobes, presses and closets, forming part of the wainscot of the house. *Kimpton* v. *Eve*, 2 Ves. & B. 349. Nor will an injunction be granted to restrain a lessee from removing manure, accumulated by feeding cattle from provender brought from other sources, provided the removal is effected with sufficient diligence and skill to avoid injury to the freehold. *Gallagher* v. *Shipley*, 24 Md. 427. But the fact that an injunction is denied does not at all affect the right of the party to any remedy he may have in an action at law for the injury or wrong done.

As between landlord and tenant, the rule in regard to the removal of fixtures is most liberally construed in favor of the latter. And where the landlord, before the expiration of the term, enjoins the tenant from removing the fixtures, the tenant will be allowed a reasonable time after the dissolution of the injunction within which to demand and remove the fixtures, although the term may have expired pending the injunction. *Bircher* v. *Parker*, 40 Mo. 118.

§ 17. **Vendor and vendee.** Courts are less liberal in determining the right to fixtures as between vendor and vendee than as between landlord and tenant; and as a general rule, upon a sale of the freehold any and all fixtures attached to it will pass, unless there is some express provision to the contrary. *Pea* v. *Pea*, 35 Ind. 387; *Farrar* v. *Stackpole*, 6 Me. 157; *Hitchman* v. *Walton*, 4 Mees. & W. 409; *Dispatch Line of Packets* v. *Bellamy Manuf. Co.*, 12 N. H. 205; *Harkness* v. *Sears*, 26 Ala. 493. In the case last cited, it is said by Rice, J., to be well settled, "that as between vendor and vendee the stationary machinery by which turning-lathes, or any of those machines which are portable and of equal use everywhere, are impelled, must be regarded as irremovable fixtures and part of the freehold, whenever such stationary machinery shall have been erected on the land by the vendor himself during his ownership, for his own use, and fixed in or to the ground, or to some substance already become a part of the freehold, whether erected for the purpose of trade or agriculture, and that such stationary machinery passes by the deed of the vendor to the vendee conveying the land on which it stands." And see *Potter* v. *Cromwell*, 40 N. Y. (1 Hand) 287; *Blethen* v. *Towle*, 40 Me. 310; *McGreary* v. *Osborne*, 9 Cal. 119; *ante*, §§ 377, 384, 8, 15. A simple deed of a hotel was held to carry with it as an appurtenance the hotel sign and post, though spiked to the sidewalk, some feet in front of the hotel lot. *Redlon*

v. *Barker*, 4 Kans. 445. And where the owner of land loaned rails from a fence on his land for use upon the land of another, and afterward, and while the rails were thus away, he conveyed his land to the person to whom he lent the rails,—it was held, that the rails passed to the grantee by the deed of the land as part of the realty. *McLaughlin* v. *Johnson*, 46 Ill. 163. Rails laid up in a fence are a part of the realty and belong to the owner of the soil. *Boon* v. *Orr*, 4 G. Greene, 304. And this is the rule although the fence is not staked with stakes stuck into the ground. *Smith* v. *Carroll*, id. 146. Permanent fences, when erected, become parts of the realty, and pass with it. *Glidden* v. *Bennett*, 43 N. H. 306; *Sawyer* v. *Twiss*, 26 id. 348. So, in a New York case it was held, that where the owner of land conveys the same, by an absolute conveyance, *wine plants*, set in the ground and growing there at the time, will pass by the conveyance, notwithstanding a parol reservation thereof by the grantor. *Wintermute* v. *Light*, 46 Barb. 278. See, also, *Smith* v. *Price*, 39 Ill. 28. And in a case in the same State if was held, that poles used necessarily in cultivating hops, which were taken down for the purpose of gathering the crop, and piled in the yard with the intention of being replaced in the season of hop-raising, were a part of the realty, and passed to the grantee of the land by the usual conveyance. *Bishop* v. *Bishop*, 11 N. Y. (1 Kern.) 123. But this decision was placed upon the ground, that as the hop-root is perennial, and would pass to a purchaser, so the pole, which is used exclusively in connection with it, and is indispensable to its cultivation, passes equally to such purchaser. Id. And in a subsequent case it was held, that unattached pieces of scantling, used on a tobacco farm to hang tobacco on, and put up and taken down as required for the purpose of curing the tobacco, are not fixtures and will not pass, as such, by a conveyance of the farm. And the court declared that, in determining what will pass as fixtures by a deed conveying the freehold, the distinction between things actually annexed and things totally disconnected is one of most easy and certain application, and should be maintained, except where the exigencies of trade or long-established usage, or precise authority, has established an exception. *Noyes* v. *Terry*, 1 Lans. (N. Y.) 219.

In *Noble* v. *Sylvester*, 42 Vt. 146, it was held, that a stone, split out and slightly removed from its original connection, and laid up for the purpose, and with the intention by the owner of the farm upon which it was quarried and left, of using it in the construction of a tomb elsewhere, would not pass by a conveyance of the farm. In such case the same principles should govern that are applicable to timber, fence rails, and the like, that are severed from the freehold; if intended for

use on the farm, they pass by the deed in a sale of it; if to be used elsewhere, they do not pass. See *Brock* v. *Smith*, 14 Ark. 431; *Mott* v. *Palmer*, 1 N. Y. (1 Comst.) 564; *Fulton* v. *Norton*, 64 Me. 410; *Drake* v. *Wells*, 11 Allen, 141. And in *Johnson* v. *Mehaffey*, 43 Penn. St. 308, it was held that rolls cast for a rolling-mill, paid for and delivered at the mill, where they remained for more than two years without being turned or finished off, or put into the mill, did not, on sheriff's sale of the mill, pass to the purchaser as realty. So, in a recent case in New Hampshire, it was held that the saws purchased by the owner of a saw-mill for the purpose of using them in the mill, where he had kept them for a long time, did not lose their character of personalty, and did not pass by a conveyance of the mill. *Burnside* v. *Twitchell*, 43 N. H. 390. See *Bliss* v *Misner*, 2 Hun (N. Y.), 391; S. C., 4 N.Y. Sup. (T. & C.) 633. And in a Vermont case, it appeared that just prior to the conveyance of a house and lot, certain blinds and double windows made for the house, had been procured and set up in the house, where they remained for a short time, and before the sale they were taken down and put away by the vendor. The windows had been fitted to the casings and set up on the inside of the windows belonging to the house, but had never been nailed or fastened in, and no preparation had been made to fasten them to the house. Nor were the blinds in any way attached to the building or windows, or even fitted to them. And the court held that neither the blinds nor the windows passed with the house by the conveyance to the grantee. *Peck* v. *Batchelder*, 40 Vt. 233.

§ 18. **Mortgagor and mortgagee.** A mortgage of lands is not to be construed to pass any different rights with respect to fixtures than an absolute conveyance. Mortgagees stand, therefore, upon the same footing in this regard with ordinary purchasers, and are entitled to every thing that is actually or constructively annexed to the freehold (*Walmsley* v. *Milne*, 7 C. B. [N. S.] 115; *Maples* v. *Millon*, 31 Conn. 598; *Quinby* v. *Manhattan, etc., Co.*, 24 N. J. Eq. 260; *McKim* v. *Mason*, 3 Md. Ch. Dec. 186; *Millikin* v. *Armstrong*, 17 Ind. 456; *Voorhees* v. *McGinnis*, 48 N. Y. [3 Sick.] 278); whether trade fixtures or not (*Ex parte Colton*, 2 M. D. & DeG. 725); and whether the annexation was made before the mortgage was given, or afterward. *Cullwick* v. *Swindell*, L. R., 3 Eq. 249; *Lynde* v. *Rowe*, 12 Allen, 100; *Metropolitan Society* v. *Brown*, 28 Beav. 454. A mortgage is a security or pledge for a debt, and it is not unreasonable if a fixture be annexed to land at the time of the mortgage, or if the mortgagor in possession afterward annexed a fixture to it, that the fixtures shall be deemed an additional security for the debt, whether it be a trade fix-

ture or a fixture of any other kind. *Climie* v. *Wood*, L. R., 3 Exch. 256; S. C. affirmed, 4 id. 328. And see *Longbottom* v. *Berry*, L. R., 5 Q. B. 123; *Mather* v. *Fraser*, 2 Kay & J. 536. But see *Hill* v. *Sewald*, 53 Penn. St. 271. And although a mortgage of fixtures as personal property may perhaps operate as a constructive severance as between the parties thereto (see *Hensley* v. *Brodie*, 16 Ark. 511; *Ropps* v. *Barker*, 4 Pick. 238; *McClintock* v. *Graham*, 3 McCord [S. C.], 553), yet it is held to be of no force against a subsequent purchaser of the realty without notice of its existence; and such a purchaser will take the land free from the incumbrance created by such mortgage. *Bringholff* v. *Munzenmaier*, 20 Iowa, 513. And see *Voorhees* v. *McGinnis*, 48 N. Y. (3 Sick.) 278.

It should be observed, that there are cases where, of course, the language of the mortgage conveyance may be such, that, upon its proper construction, the mortgagor will be allowed to remove articles set up either for trade or other purposes. *Waterfall* v. *Penistone*, 6 El. & Bl. 876. And see *Crippen* v. *Morrison*, 13 Mich. 23; *Burnside* v. *Twitchell*, 43 N. H. 390; *Crane* v. *Brigham*, 3 Stockt. (N. J.) Ch. 30; *Haley* v. *Hammersley*, 3 DeGex, F. & J. 587; S. C., 9 W. R. 562. The owner of an elevator purchased from the plaintiff an engine and boiler to place therein, and to secure a part of the purchase-money gave his promissory note, secured by chattel mortgage upon the property, wherein it was stipulated that the engine and boiler should be and remain personal property until the note was paid. They were placed upon a foundation outside of the elevator and a house was built over them,—and it was held, that the engine and boiler continued personal property until the note was paid, as against a prior mortgagee of the realty. *Tifft* v. *Horton*, 53 N. Y. (8 Sick.) 377; S. C., 13 Am. Rep. 537. See, also, *Eaves* v. *Estes*, 10 Kans. 314; S. C., 15 Am. Rep. 345.

§ 19. **Landlord and tenant.** The old rule, that whatever is annexed to the soil belongs to the soil, receives the largest and most liberal construction, as between persons holding the relation of landlord and tenant. See *ante*, 372, 374, §§ 5, 6; *Thomas* v. *Crout*, 5 Bush (Ky.), 37. And the law now regards with peculiar favor the right of tenants to remove articles annexed by them to the freehold, and extends much greater indulgence to them in this respect than it concedes to executors, remaindermen, or any other class of persons. *Wall* v. *Hinds*, 4 Gray, 256. And see *Elwes* v. *Maw*, 3 East, 38; S. C., 2 Smith's Lead. Cas. 228; id. (7th Am. ed.) 212, notes. Public policy, especially in this country, requires that the tenant should be permitted so to use the premises he occupies, as to derive from them the greatest amount of profit and comfort, consistent with the rights of the owner of the free-

hold. And the general rule has been stated to be, that any one, who has a temporary interest in land, and who makes additions to it or improvements upon it, for the purpose of the better use or enjoyment of it, while such temporary interest continues, may, at any time before his right of enjoyment expires, rightfully remove such additions and improvements. But if he omit to sever the addition or improvement until his right of enjoyment ceases, such omission is to be deemed an abandonment of his right, and thereafter the addition or improvement he has made becomes, to all intents, a part of the inheritance, and the tenant, as well as any other person who severs it, becomes a trespasser. HARRIS, J., in *King* v. *Wilcomb*, 7 Barb. 263; approved in *Cromie* v. *Hoover*, 40 Ind. 57. And see *ante*, 383, § 14; *Winslow* v. *Merchants' Ins. Co.*, 4 Metc. (Mass.) 306; 2 Kent's Com. 344, and notes.

For illustrations of the different kinds of erections which a tenant may put upon the leasehold premises and claim the right to remove, see *ante*, 372, 374, §§ 5, 6, also 381, 384, §§ 13, 15. And see *post*, title *Landlord and Tenant*.

§ 20. **Bankrupts, etc.** Questions involving the right to fixtures sometimes arise between the assignees of bankrupts and mortgagees, or other parties. In the decision of such questions much, of course, must depend upon the provisions of the existing bankruptcy statutes, but generally speaking, the assignees of a bankrupt tenant would be entitled to whatever interest in the fixtures the bankrupt himself possessed. See *Horn* v. *Baker*, 9 East, 215; S. C., 2 Smith's Lead. Cas 262; *Ex parte Astbury*, L. R., 4 Chan. App. Cas. 630; *Ex parte King*, 4 Jur. 510; *Ex parte Barclay*, 5 DeG. M. & G. 411; *Williams* v. *Evans*, 23 Beav. 239.

Controversies respecting the right to fixtures, arising between tenants in common who are owners of the fee, are to be decided on the same principle as if they had arisen between grantor and grantee, or as if partition had been effected by the parties through mutual deeds of bargain and sale. *Walker* v. *Sherman*, 20 Wend. 636. See, also, *Parsons* v. *Copeland*, 38 Me. 537.

So, the same strict rule which holds true as between vendor and vendee, etc., has also been applied as between the heir or vendee of the husband and his widow in respect to the dower premises. *Powell* v *Monson Co.*, 3 Mason (C. C.), 459; 1 Schoul. Pers. Prop. 152. See *Way* v. *Way*, 42 Conn. 52.

§ 21. **Creditors by judgment or execution.** Fixtures cannot ordinarily be seized and sold under an execution against personal property. *Pemberton* v. *King*, 2 Dev. (N. C.) 376; *Oves* v. *Ogelsby*, 7 Watts (Penn.), 106. But they are bound by the lien of prior and subse-

quent judgments against the real estate, and pass to a purchaser under an execution levied on the land. Id.; *Goddard* v. *Chase*, 7 Mass. 432; *Hutchman's Appeal*, 27 Penn. St. 209. And when a tenant is entitled to remove fixtures from the freehold and treat them as personalty, the same right may be exercised by any one who claims under or against him, as an assignee or execution creditor. *State* v. *Bonham*, 18 Ind. 231; *Doty* v. *Gorham*, 5 Pick. 487; *Overton* v. *Williston*, 31 Penn. St. 155. It follows, that fixtures may be seized and severed by virtue of an execution against the tenant, whenever their character is such that they might have been removed without the consent of the landlord. *Poole's case*, 1 Salk. 368; *Minshall* v. *Lloyd*, 2 M. & W. 450; 2 Smith's Lead. Cas. (7th Am. ed.) 217. And see *Farrar* v. *Chauffetete*, 5 Denio, 527. So it may be taken on attachment. *O'Donnell* v. *Hitchcock*, 118 Mass. 401.

§ 22. **Distraining.** Things affixed to the freehold, although belonging to the tenant, cannot be distrained; for the reason that such things savor of the realty, and the right of distress is confined to personal chattels. *Vausse* v. *Russel*, 2 McCord (S. C.), 329. And the privilege continues, although they may be temporarily removed from their places for the purpose of repairs. *Reynolds* v. *Shuler*, 5 Cow. 323. But if they are permanently separated from the freehold by the tenant or his agent, for the purpose of being sold, or with a view of removing them from the premises altogether, they no longer retain the character of fixtures, and may be distrained, even though they may have passed into the hands of a *bona fide* mortgagee, who removed them with the object of securing himself under his mortgage. Id. And see *Darby* v. *Harris*, 1 Ad. and El. (N. S.) 895; *Turner* v. *Cameron*, L. R., 5 Q. B. 306.

§ 23. **Replevin to recover.** Fixtures cannot be taken or removed under a writ of replevin. A writ of replevin is effectual for the delivery of *personal* property only; and it furnishes no justification to an officer, who, under it, severs and delivers part of the *realty*. *Roberts* v. *Dauphin Deposite Bank*, 19 Penn. St. 71. But if a fixture or other part of the real estate be wrongfully detached from the freehold, the thing detached becomes the personal property of the owner of the soil, and he may, in general, maintain trover or replevin for its recovery. *Harlan* v. *Harlan*, 15 id. 507. See, also, *Laflin* v. *Griffiths*, 35 Barb. 58.

§ 24. **Trespass for taking.** Fixtures, when severed from the freehold, again assume the characteristics of personal chattels, and the action in regard to them is governed by rules similar to those applicable in ordinary actions relating to the personalty. When severed and

carried away, the proper remedy is by an action of trespass *de bonis asportatis.* See *Udal* v. *Udal*, Aleyn, 81; *Hensley* v. *Brodie*, 16 Ark. 511; *Heaton* v. *Findlay*, 12 Penn. St. 304; *Foley* v. *Addenbrooke*, 13 Mees. & W. 174; *Gardner* v. *Finley*, 19 Barb. 317. And the landlord or owner of the soil is entitled to the same remedies for the recovery of the things severed, whether taken away by the tenant or by a stranger. And although the property in fixed articles may belong to the landlord by the terms of the demise or otherwise, the tenant may nevertheless maintain trespass *de bonis asportatis* against a stranger who wrongfully removes them; for he has, during his term, a special property in them. *Boydell* v. *M'Michael* 1 Cr. M. & R. 177; *Hitchman* v. *Walton*, 4 Mees. & W. 409; *Powers* v. *Dennison*, 30 Vt. 752. A mortgagee of real estate may maintain trespass for taking the mortgaged property subsequently to his mortgage. *Burnside* v. *Twitchell*, 43 N. H. 390. So, it has been held that the tenant and the landlord may both maintain actions at the same time for injuries done to the estate; the tenant for the interruption of his estate and diminution of profits, and the landlord for the permanent injury to the property. *George* v. *Fisk*, 32 N. H. 32. And see *Achey* v. *Hull*, 7 Mich. 423.

But it is well settled that none can maintain an action of trespass *quare clausum fregit*, but he who has possession in fact of the land. Thus, one who has leased his lands for years, or even at will, cannot maintain this action against a stranger, for any injury to the possession, while in the actual occupation of his tenant. *Taylor* v. *Townsend*, 8 Mass. 415; *Campbell* v. *Arnold*, 1 Johns. 511. But see *Starr* v. *Jackson*, 11 Mass. 519. Nor can a landlord maintain an action of trespass *quare clausum*, pending the term, against a tenant who has wrongfully severed from the freehold articles put up by himself during the term, or which were demised to him together with the premises. See *Overton* v. *Williston*, 31 Penn. St. 155; Amos & Fer. on Fixt. 229.

An auctioneer put into possession of fixtures attached to the freehold, for the purpose of selling them, the purchaser being bound to detach and remove them, has not such a possession as will support trespass *de bonis asportatis* for their wrongful removal. *Davis* v. *Danks*, 3 Exch. 435.

§ 25. **Trover for conversion of.** Trespass will lie against the owner of land for the removal of annexations to the land, made by another under a parol license. *Ricker* v. *Kelley*, 1 Me. 117; *Wilgus* v. *Getting*, 21 Iowa, 177; *Noble* v. *Sylvester*, 42 Vt. 146. And as property erected by a tenant on the land of another, under a parol agreement to do so, is regarded as the personal property of the builder (see *ante*, 381,

he may maintain trover for it, against the purchaser of the land under an execution. *Hilborne* v. *Brown*, 12 Me. 162. But he cannot hold such property against a subsequent vendee, or mortgagee of the land, who had no notice of the license or agreement under which the annexation was made; provided the annexation, in the absence of such license, would be a fixture. *Powers* v. *Dennison*, 30 Vt. 752. In New Hampshire, it has been held that manure lying on the surface of the soil, but not incorporated with it, was personal property for which trover could be maintained. *Pinkham* v. *Gear*, 3 N. H. 484. And trover was held to lie against the *bona fide* purchaser of loads of earth unlawfully taken from the plaintiff's land. *Riley* v. *Boston Water Power Co.*, 11 Cush. 11. And see *Higgon* v. *Mortimer*, 6 Carr. & P. 616.

But a lessee cannot, even during his term, maintain trover for fixtures attached to the freehold. *Mackintosh* v. *Trotter*, 3 M. & W. 184. And if he does not remove a fixture erected by him during his term, he cannot maintain trover against the owner of the land for refusing to permit him to enter and remove it afterward. *Stockwell* v. *Marks*, 17 Me. 455. See *Beers* v. *St. John*, 16 Conn. 322; *Wilde* v. *Waters*, 16 C. B. 637. And it has been held that trover will not lie for fixtures which a tenant has left annexed to the freehold, after he has quitted possession with the leave of his landlord, for the purpose of enabling him to make terms as to their purchase by the incoming tenant. *Roffey* v. *Henderson*, 17 Q. B. 575; S. C., 16 Jur. 84. But the right to leave articles on the premises for valuation by an incoming tenant may be conceded by usage or custom. *Davis* v. *Jones*, 2 B. & A. 166.

If a landlord, under a distress for rent in arrear, severs fixtures from the freehold and disposes of them, he is liable in trover. *Dalton* v. *Whittem*, 3 Q. B. 961; S. C., 3 G. & D. 260. But when articles connected with the land are wrongfully severed therefrom, the right to their possession vests in the landlord, and he may maintain trover to recover damages caused by the severance and conversion. See *Harlan* v. *Harlan*, 15 Penn. St. 507. And where the owner of a mill demised it to a tenant for a term, and the latter clandestinely, and without permission of his landlord, dismantled the mill of the machinery, which, on its being removed, was seized by the sheriff under a *fi. fa.*, and sold under his authority to a *bona fide* purchaser,—it was held, that the landlord might maintain trover against such purchaser, though the tenant's term was unexpired. *Farrant* v. *Thompson*, 5 B. & A. 826; S. C., 2 D. & R. 1.

§ 26. **Case by reversioner.** If the tenant, during his term, sever

and take away from the freehold any part thereof which he is not entitled to remove, the landlord may sustain an action on the case against the tenant, for the injury to his reversionary interest. So, an action on the case will lie, at the suit of the landlord, against a stranger who commits any injury to the reversion. And a mortgagee who has been injured by the removal of fixtures is entitled to his action on the case for the injury. See *Hitchman* v. *Walton*, 4 M. & W. 409; *Roberts* v. *Dauphin Deposite Bank*, 19 Penn. St. 71.

§ 27. **Damages.** See generally, *ante*, Vol. 2, title *Damages*. In an action for cutting into and carrying away the plaintiff's soil, the proper measure of damages is the value to the plaintiff of the land so taken, and not the expense which would be incurred in restoring it to its original condition. *Jones* v. *Gooday*, 8 M. & W. 146. In an action for taking coals from a mine, where the defendant is a mere wrong-doer, the measure of damages is the value of the coals at the time when they first existed as chattels, and the defendant is not entitled to any deduction for the expense of getting them, or for a rent payable to the mine-owner on coals from the mine (*Wild* v. *Holt*, 9 id. 672); but he must be allowed for his expense and labor in removing the coal and bringing it to the pit's mouth, though not in first severing it from the mine. *Morgan* v. *Powell*, 3 Q. B. 278; S. C., 2 G. & D. 721. See *Martin* v. *Porter*, 5 M. & W. 352; S. C., 2 H. & H. 70; 2 Selw. N. P. 1274; *Forsyth* v. *Wells*, 41 Penn. St. 291.

In trespass for distraining, among other goods, goods not distrainable, the tenant can only recover for the actual injury he has sustained, the landlord being a trespasser *ab initio* only as to such goods as were not distrainable. *Harvey* v. *Pocock*, 11 M. & W. 740. See *Attack* v. *Bramwell*, 3 B. & S. 520; S. C., 9 Jur. (N. S.) 179.

In an action on the case by a reversioner for an injury done to the premises, the true rule of damages is held to be the amount of injury done to the reversionary estate. *Dutro* v. *Wilson*, 4 Ohio St. 101. See *Chipman* v. *Hibberd*, 6 Cal. 162.

CHAPTER LXX.

FORCIBLE ENTRY AND DETAINER.

ARTICLE I.

OF FORCIBLE ENTRY AND DETAINER IN GENERAL.

Section 1. Origin. It was the doctrine of the common law of England from the time of the Norman Conqueror until the statute of 5 Rich. II, ch. 8, "Of Forcible Entry and Detainer,"—a period of nearly three hundred years,—that if a man had a right of entry he was permitted to enter with force and arms; and to retain his entry by force where his entry was lawful. Bac. Abr., *sub title* Forcible Entry and Detainer; *Dustin* v. *Cowdry*, 23 Vt. 631. But this indulgence of the common law (permitting forcible entries into lands withheld from the rightful proprietors) having been found by experience to be very prejudicial to the public peace, by giving an opportunity to powerful men, under the pretense of feigned titles, forcibly to eject their weaker neighbors, it was thought necessary, by severe laws, to restrain all persons from the use of such violent methods of doing themselves justice, and to this end the statute above referred to was enacted by the English Parliament. Hawk. P. C., B. 1, ch. 64, § 1. And see *People* v. *Smith*, 24 Barb. 16. This statute was followed by others of like import in England, and similar statutes on the subject have been enacted in many of the States of the American Union. See *People* v. *Anthony*, 4 Johns. 198.

§ 2. **Definition and nature.** A forcible entry and detainer is defined to be the violent "taking or keeping possession of lands or tenements, by means of threats, force or arms, and without authority of law." 1 Bouv. Dict. 598. And see *State* v. *Dudley*, 10 Mass. 409; *Buel* v. *Frazier*, 38 Cal. 693; *Ladd* v. *Dubroca*, 45 Ala. 421; *Hoffman* v. *Harrington*, 22 Mich. 52; *Treat* v. *Forsyth*, 40 Cal. 484. And the proceedings to prevent forcible entry and detainer are of a peculiar and anomalous kind. The proceedings under the statute in earlier days were in their nature criminal, for a redress of the wrong to the public done by a breach of its peace. The statute was not intended to confer rights. And the main object still is to preserve the public peace

and prevent parties from asserting their rights by force or violence, though by gradual additions the remedy has become in effect a private as well as a public one. See *Wood* v. *Phillips*, 43 N. Y. (4 Hand) 152; *Small* v. *Gwinn*, 6 Cal. 447; *Bowers* v. *Cherokee Bob*, 45 id. 495. In general, the statutory proceedings in the several States have reference to a restitution of the property, if the individual who complains has been dispossessed, as well as to the punishment of the offender for a breach of the public peace. The proceeding provided by statute in Michigan is a substitute for the proceeding by indictment in England, and being criminal in its nature, requires the same proof. *Harrington* v. *Scott*, 1 Mann. 17. In Illinois, the nature of the action has been changed from a criminal to a civil proceeding, solely to regain the possession, and no limitation has been prescribed. *Robinson* v. *Crummer*, 5 Gilm. (Ill.) 218; *Thompson* v. *Sornberger*, 59 Ill. 326.

§ 3. **What possession required.** The remedy for a forcible or unlawful entry was designed to protect the actual possession, whether rightful or wrongful, against unlawful invasion, and to afford summary redress and restitution. *People* v. *Leonard*, 11 Johns. 504; *Wood* v. *Phillips*, 43 N. Y. (4 Hand) 152. Actual possession, not the constructive possession imputed to the title, must be averred and proved, to support the action. *Russell* v. *Desplous*, 29 Ala. 308; *Singleton* v. *Finley*, 1 Port. (Ala.) 144. The entry of the owner is unlawful if forcible, and the entry of any other person is unlawful, whether forcible or not. If the defendant enters unlawfully, the plaintiff is entitled to recover, without any regard to the question of his right of possession. His actual possession, of itself, gives him a right of possession against any person not having a right of entry. *Olinger* v. *Shepherd*, 12 Gratt. (Va.) 462. And see *People* v. *Fields*, 1 Lans. (N. Y.) 222; *Barlow* v. *Burns*, 40 Cal. 351; *Neely* v. *Butler*, 10 B. Monr. (Ky.) 48; *Tucker* v. *Phillips*, 2 Metc. (Ky.) 416; *Burt* v. *State*, 3 Brev. (S. C.) 413; *Emsley* v. *Bennett*, 37 Iowa, 15; *Jones* v. *Shay*, 50 Cal. 508; *Powell* v. *Davis*, 54 Mo. 315. One claiming a vacant lot, inclosed the lot by building a fence joining another fence and a brick wall sufficient to keep out domestic animals, and informed all persons that the premises were appropriated; and it was held, that this was a sufficient actual possession to maintain forcible entry and detainer against parties breaking down and destroying the fence in a forcible manner, under claim of ownership. *Allen* v. *Tobias*, 77 Ill. 169. Nor does the possession of uncultivated land necessary to support forcible entry and detainer on behalf of the owner, require the constant presence of the plaintiff, either in person or by agent. Any acts done by him on the premises, showing an intention to hold possession, for the

purpose of cultivation and improvement, will be sufficient. *Bradley* v. *West*, 60 Mo. 59. And although fences are a means by which the possession of land may be taken and held, yet, they are not the only means. There may be an actual possession without fences or inclosure of any kind. *Goodrich* v. *Van Landigham*, 46 Cal. 601. And where a person cultivated a lot, and had a stable thereon, immediately adjoining the lot on which he lived, it was held that he had sufficient possession although the lot was but partly inclosed. *Valencia* v. *Couch*, 32 id. 339.

But possession of land sufficient to authorize an action of forcible entry and detainer must be *bona fide* and not a sham. Thus, where the plaintiff was driven off by stress of weather, and returned when permitted, such temporary absence should not defeat his action. On the other hand, where he attempted to get possession in order to throw the *onus* of a suit in ejectment on another, by simply going on the land and ploughing for a half a day or so, and then absenting himself for six months or more, one entering on the land at that time would have a right to presume that his project had been abandoned. *DeGraw* v. *Prior*, 60 Mo. 56. Nor can an action of forcible entry and detainer be maintained upon a mere scrambling possession. *Conroy* v. *Duane*, 45 Cal. 597. As between two parties struggling for the possession, neither can maintain an action of forcible entry and detainer against the other until he has acquired an actual possession which has ripened into a peaceable occupation. *Voll* v. *Butler*, 49 id. 75. So, an agreement to occupy, take care of, and purchase, when the tenant is able, is not a tenancy subject to forcible entry and detainer. *Reeder* v. *Bell*, 7 Bush (Ky.), 255. The mere act of nailing up the doors of a house does not amount to retaining possession. *Hopkins* v. *Buck*, 3 A. K. Marsh. (Ky.) 110. And erecting half a cabin, and deadening trees, without occupying the land, are not sufficient evidence of possession to support the action. *Pennsylvania* v. *Lemmon*, Add. (Penn.) 315.

§ 4. **Who may maintain.** In New York, it is the person who has the legal right to the possession who is to institute the proceedings in the case of a forcible entry and detainer. *People* v. *Fulton*, 11 N. Y. (1 Kern.) 94. And so in Michigan, *Hoffman* v. *Harrington*, 22 Mich. 52. And in Kentucky, as the proceedings are purely legal, the warrant must be in the name of him who has the legal title. *Sullivan* v. *Enders*, 3 Dana (Ky.), 66. In Alabama, it is sufficient that the plaintiff has the right to the possession (*Hightower* v. *Fitzpatrick*, 42 Ala. 597; *House* v. *Camp*, 32 id. 541); while in Missouri, he must not only be entitled to the possession of the land, but must have been once in lawful possession. *Burns* v. *Patrick*, 27 Mo. 434; *Wood* v. *Dal-*

ton, 26 id. 581. In Iowa, it is immaterial in what capacity or relation the plaintiff is in possession, whether as owner, tenant, agent, or a mere trespasser. *Emsley* v. *Bennett*, 37 Iowa, 15; *Lorimier* v. *Lewis*, 1 Morr. (Iowa) 253. In some of the States the proceedings may be maintained by an administrator. See *Spear* v. *Lomax*, 42 Ala. 576; *Lass* v. *Eisleben*, 50 Mo. 122; *Moody* v. *Ronaldson*, 38 Ga. 652; *Beezley* v. *Burgett*, 15 Iowa, 192. And in Tennessee, although the action abates on the death of either party thereto (*Havis* v. *Bickford*, 9 Humph. [Tenn.] 673), it may be maintained by an administrator when the wrong was committed in the life-time of the intestate, and the estate of the intestate was a chattel interest. *Winningham* v. *Crouch*, 2 Swan (Tenn.), 170. Where land in Illinois, sold under deeds of trust, is conveyed to an administrator in trust for the heirs of his intestate, the debts secured belonging to the estate, the administrator may maintain forcible detainer, in his name, against one withholding the possession (*Rice* v. *Brown*, 77 Ill. 549); and in the same State, a purchaser at a master's sale may maintain an action of forcible detainer. *Pensoneau* v. *Heinrich*, 54 id. 271. Under the statute of Colorado, a purchaser of real estate at a sheriff's sale may maintain unlawful detainer against the judgment debtor, and all who stand in the same situation, to recover possession of the premises so purchased. *Liss* v. *Wilcoxen*, 2 Col. T. 85. And in Maine, it may be maintained by the receivers of an insolvent bank against the execution creditor. *Baker* v. *Cooper*, 57 Me. 388. A personal representative may maintain the action in Alabama, either in his representative or individual character, where he has been in actual possession of the land. *Spear* v. *Lomax*, 42 Ala. 576. But a purchaser of lands at a sale under a mortgage or a deed of trust, who has never had actual possession, cannot maintain the action for their recovery. *Womack* v. *Powers*, 50 Ala. 5. Nor can a grantee maintain forcible entry and detainer under the Vermont statute, against the grantor remaining in possession, although the latter, on notice to quit, promises to surrender possession. *Pitkin* v. *Burch*, 48 Vt. 521. And see *Walker* v. *Thayer*, 113 Mass. 36. Nor can the action be maintained in Virginia, by a vendor of land, against one in possession under an executory contract of sale, with which he has failed to comply, where the former has subsequently conveyed the land to a third person. Such action must be brought by the latter. *Dobson* v. *Culpepper*, 23 Gratt. (Va.) 352.

The tenant should bring the action for the disturbance of his possession, and not the landlord. *McCartney* v. *Alderson*, 49 Mo. 456. And see *Polack* v. *Shafer*, 46 Cal. 270; *Jones* v. *Shay*, 50 id. 508; *Hays* v. *Porter*, 27 Tex. 92. But the plaintiff may rely upon the

possession of his tenant to maintain the action. *Langworthy* v. *Myers*, 4 Iowa, 18; *Lecatt* v. *Stewart*, 2 Stew. (Ala.) 474; *McGuire* v. *Cook*, 13 Ark. 448; *Bradley* v. *Hume*, 18 id. 284, 304. But see *contra*, *Mann* v. *Brady*, 67 Ill. 95, if the premises are leased to a tenant who is in actual possession at the time of the forcible entry. One tenant in common may sue, without joining his co-tenant. *Turner* v. *Lumbrick*, 1 Meigs (Tenn.), 7; *Bowers* v. *Cherokee Bob*, 45 Cal. 495. But one joint tenant cannot recover the exclusive possession of the premises as against his co-tenant. *Jamison* v. *Graham*, 57 Ill. 94. An unexpired term of years is a sufficient estate to support this proceeding. *Mead* v. *Daniel*, 2 Port. (Ala.) 86.

§ 5. **What force or violence used.** It may be stated in a general way, that in order to constitute such a forcible entry as will sustain the process of forcible entry and detainer, there must be either actual violence or circumstances tending to excite fear of such violence, either to the person, or to goods, houses, or inclosures. *Butts* v. *Voorhees*, 1 Greene (N. J. Law), 13; *Hopkins* v. *Calloway*, 3 Sneed (Tenn.), 11; *Holmes* v. *Holloway*, 21 Tex. 658; *Commonwealth* v. *Dudley*, 10 Mass. 403; 5 Wait's Pr. 292. But if a possession, surreptitiously obtained, is maintained by force, the entry will be considered forcible. *Burt* v. *State*, Treadw. (S. C.) Const. 489. And the general doctrine above stated will be found to have undergone considerable modification in some of the States.

In England, it is not necessary to constitute a forcible detainer, that any one should be assaulted, but only that the entry or the detainer should be with such numbers of persons and show of force, as is calculated to deter the rightful owner from sending the persons away and reserving his own possession. *Milner* v. *Maclean*, 2 Carr. & P. 17. And see *Watson* v. *Whitney*, 23 Cal. 375; *Harrow* v. *Baker*, 2 Greene (Iowa), 201. Forcibly breaking into a house in the peaceable possession of another, in his absence, is a forcible entry within the New Jersey statute. *Mason* v. *Powell*, 38 N. J. Law, 576. In California, to constitute a forcible entry there must be personal violence, either threatened or actual, or some ingredient of fraud or willful wrong on the part of the wrong-doer. *Dickinson* v. *Maguire*, 9 Cal. 46. But see *Conroy* v. *Duane*, 45 id. 597. In Georgia, the gist of the proceedings is force on the part of the defendant. *Curry* v. *Hendry*, 46 Ga. 631. See *Minor* v. *Duncan*, 54 id. 516. Under the Kansas statute, the proceedings may be had in all cases "where the defendant is a settler or occupier of lands or tenements, without color of title, and to which the complainant has the right of possession." *Price* v. *Olds*, 9 Kans. 66. And the proceedings may be had under the Iowa

statute, "where the defendant has, by force or intimidation, or fraud or stealth, entered upon the prior actual possession of another in regard to real property, and detained the same." *Stephens* v. *McCloy*, 36 Iowa, 659. The statute of Michigan (Comp. L., § 4717), which is the same as the statute of New York (2 R. S. 507), and originally derived from the English statute of 8 Hen. VI, ch. 9, is construed as having no application to a mere trespass, however wrongful; but the entry or the detainer must be riotous, or personal violence must be used or in some way threatened, or the conduct of the parties guilty of the entry or detainer must be such as in some way to inspire terror or alarm in the persons evicted or kept out. In other words, the force contemplated by the statute is not merely the force used against, or upon the property, but force used or threatened against persons, as a means, or for the purpose of expelling or keeping out the prior possessor. *Shaw* v. *Hoffman*, 25 Mich. 162. And see *Willard* v. *Warren*, 17 Wend. 257; *Gray* v. *Finch*, 23 Conn. 495. In Wisconsin, although actual force and violence must be proved greater than such as constitutes a mere trespass, yet there need not have been such force and violence as would sustain an indictment at common law for forcible entry. *Jarvis* v. *Hamilton*, 16 Wis. 574. And an entry by forcing open a fastened window, after being refused the key and trying to get through a rear door, was held to be a "forcible entry" within the Wisconsin statute. *Ainsworth* v. *Barry*, 35 id. 136. In Minnesota, it is sufficient to show that the entry was unlawful, but the detainer must have been by force and strong hand. *Davis* v. *Woodward*, 19 Minn. 174. So in Arkansas, it is sufficient to show that the defendant entered unlawfully. *Fowler* v. *Knight*, 5 Eng. (Ark.) 43. And in Illinois, there need not have been actual force. *Smith* v. *Hoag*, 45 Ill. 250. But in Kentucky, there must have been actual force with a strong hand, unless the parties are landlord and tenant. *Grughler* v. *Wheeler*, 12 B. Monr. (Ky.) 183.

Taking possession of a vacant house or farm will not constitute the offense in Tennessee. *Hopkins* v. *Calloway*, 3 Sneed (Tenn.), 11. But it is held to be a forcible detainer in Vermont, to prevent with force the owner of land from watering cattle thereon. *Foster* v. *Kelsey*, 36 Vt. 199. And in Missouri, the mere entry on the land against the will of the party in actual lawful possession is sufficient. *Dennison* v. *Smith*, 26 Mo. 487. And it is unnecessary to prove either force or threats. Id.

The instances given above will serve to illustrate the variety that prevails in the statutory provisions on the subject in the different States. For full information, the statute of the particular State should

be consulted in connection with the decisions of the courts giving construction thereto.

§ 6. **Complaint or facts stated.** It has been said that great strictness and accuracy of description is not essential in these complaints. *Silvey* v. *Summer*, 61 Mo. 253; *Houghton* v. *Potter*, 23 N. J. Law, 338. So an objection that the complaint is not sufficiently definite and certain may be waived by answering and going to trial on the merits. *Jarvis* v. *Hamilton*, 16 Wis. 574. Under the Virginia statute, the only complaint required in proceedings for unlawful detainer is that contained in the summons. *Olinger* v. *Shepherd*, 12 Gratt. (Va.) 462. And see *Settle* v. *Settle*, 10 Humph. (Tenn.) 504; *Butcher* v. *Palmer*, 1 Heisk. (Tenn.) 431. In New York, the complaint must allege the right of possession (*People* v. *Fulton*, 11 N. Y. [1 Kern.] 94); and the affidavit must be positive and state the facts positively, or if facts are stated upon information, they should be so expressed, and the source of information given. *People* v. *Whitney*, 1 N. Y. Sup. (T. & C.) 533. In California, the complaint is insufficient if it does not allege that the entry or detainer was forcible. *McEvoy* v. *Igo*, 27 Cal. 375. In New Jersey, the estate of the plaintiff, in the lands forcibly entered upon, must be specified in the complaint (*Wall* v. *Hunt*, 4 Halst. 37; *Berry* v. *Williams*, 21 N. J. Law, 423); and the complaint must also show that the complainant was in possession of the premises, either in fact or in law. *Corlies* v. *Corlies*, 17 id. 167. In Michigan, the complaint should allege or show that the complainant is entitled to the possession of the premises (*Bush* v. *Dunham*, 4 Mich. 339); and the sufficiency of the complaint as it regards the description of the premises is governed by the rules of pleading. *Clark* v. *Gage*, 19 id. 507. In Missouri, the complaint must allege a forcible detainer (*Tipton* v. *Swayne*, 4 Mo. 98); but a general description of the premises is sufficient. Id. And so in Kentucky. *Moor* v. *Massie*, 3 Litt. 296. But the Minnesota statute requires the complaint to "particularly" describe the premises; that is, with such particularity that the officer may know what premises he is to restore to the owner. *Lewis* v. *Steele*, 1 Minn. 88. So in Ohio, where the complaint is in the nature of a declaration. *Murphy* v. *Lucas*, 2 Ham. (Ohio) 255. And in Indiana, the complaint is required to show that the premises are in the county, and that the detainer is unlawful. *Boxley* v. *Collins*, 4 Blackf. (Ind.) 320. And see *Ball* v. *State*, 26 Ind. 155. In Illinois, a complaint for forcible detainer is sufficient if it show that the relation of landlord and tenant has existed, that the lease has expired, and that the tenant persists in holding the premises after a demand made in writing for the possession thereof.

Dunne v. *Trustees of Schools*, 39 Ill. 578. And see *Whitaker* v. *Gautier*, 3 Gilm. (Ill.) 443; *Leary* v. *Pattison*, 66 Ill. 203.

The complaint must disclose enough upon its face to give the court jurisdiction without a resort to parol testimony. *Treat* v. *Bent*, 51 Me. 478.

§ 7. **Who made defendant.** As a general rule, the party in actual possession of the premises detained at the time of the institution of an action of forcible entry and detainer, is the one liable to the action. *Orrick* v. *St. Louis Public Schools*, 32 Mo. 315; *Preston* v. *Kehoe*, 10 Cal. 445. The action may, however, be maintained against one through whose procurement the forcible entry is made, although not himself actually present. *Minturn* v. *Burr*, 20 id. 48; *Bailey* v. *Bailey*, 61 Me. 361. And where the defendant was wrongfully maintaining his entry, and employing his servant so to do, he was held liable for the act of his servant in maintaining such entry, although the servant used more force than his master had authorized. *Barden* v. *Felch*, 109 Mass. 154. It is likewise held, that a party who participates in the forcible entry upon land in the peaceable possession of another, and afterward assists the party entering in remaining, continues the detainer, and may properly be joined as a defendant in the action (*Blumenthal* v. *Waugh*, 33 Mo. 181); but the action cannot be maintained against two or more defendants jointly, who hold in severalty. *Reynolds* v. *Thomas*, 17 Ill. 207; *Snedeker* v. *Quick*, 7 Halst. (N. J.) 129.

In Wisconsin, it has been held that an action for unlawful detainer of demised premises will lie against a city. *Rains* v. *Oshkosh*, 14 Wis. 372.

In unlawful detainer by the husband's vendor to recover possession of premises contracted for in his name, but as trustee for the wife, she is held not to be a necessary party. *Williamson* v. *Paxton*, 18 Gratt. (Va.) 475.

§ 8. **Raising questions of title.** In an action of forcible entry and detainer, no question of title is, in general, admissible. All that devolves upon the plaintiff in that proceeding is, to show that he was lawfully possessed of the premises, and that the defendant unlawfully entered into and detained the same. *Thompson* v. *Sornberger*, 59 Ill. 326; *Georges* v. *Hufschmidt*, 44 Mo. 179; *Youngs* v. *Freeman*, 15 N. J. Law, 30; *Hunt* v. *Wilson*, 14 B. Monr. (Ky.) 36; *Milner* v. *Wilson*, 45 Ala. 478; *Mitchell* v. *Davis*, 23 Cal. 381. But although, as a general rule, the title cannot be inquired into in this form of action, yet it is admissible to look to the title to define the boundaries, or in view of the question of damages, or rents to be recovered in an

action brought by a mere intruder against the rightful owner of the land, or where the claimant, by fraud, induces another to take a lease, or to enter under him upon a false representation as to his title. In such cases, and perhaps in others, the title may be looked to upon the question, whether the case made out constitutes, in law, a wrongful entry or detainer. *Philips* v. *Sampson*, 2 Head (Tenn.), 429. See *Brooks* v. *Bruyn*, 18 Ill. 539; *Settle* v. *Settle*, 10 Humph. (Tenn.) 504.

§ 9. **Defense.** In an action of unlawful detainer, against a tenant for holding over, the defendant may prove that he did not enter under the lease, but, being already in possession, was induced to accept a lease from the plaintiff by fraudulent and false representations that the plaintiff owned the property, when, in fact, it belonged to another. *Johnson* v. *Chely*, 43 Cal. 299. So, he may defend by showing an eviction under an adverse title in a judicial proceeding of which proper notice was given to the landlord. Such a defense does not involve any question of title, the effect of an eviction being to dispossess the landlord as well as the tenant, and to relieve the latter from the obligations of his tenancy. *Wheelock* v. *Warschauer*, 21 id. 309. And in an action of forcible entry and detainer, it is competent for the defendant to prove that prior to the entry the plaintiff disclaimed to him any interest or claim in the premises; and, if proved, such fact will constitute a defense to the action. *Dudley* v. *Lee*, 39 Ill. 339.

But it is no justification of a forcible entry that the plaintiff had once abandoned the possession of the premises, without an intention to return. *Keyser* v. *Rawlings*, 22 Mo. 126. Nor can a tenant justify an unlawful detainer by showing fraud in the execution of the lease. *Simons* v. *Marshall*, 3 Iowa, 502. Nor can he set up as a defense the covenants of the landlord in the original lease to renew the term, and his refusal to comply with the covenant. *Finney* v. *Cist*, 34 Mo. 303. And where the action is by a tenant against his landlord, the defendant cannot set up a breach of the contract of letting by way of recoupment. *Johnson* v. *Hoffman*, 53 Mo. 504. His remedy in such case is an action on the contract. Id.

The facts, that the land in dispute is a part of the public domain, that it has been withdrawn from entry and sale, and that the defendant, by the advice of his attorney, and the government land officers, entered upon it for the purpose of securing a prior right to a homestead, and with a *bona fide* intention to acquire such right as soon as the land might be open to entry, do not justify an entry upon the actual occupancy of another. Nor do such facts constitute a good defense to an action of unlawful detainer. *Randall* v. *Falkner*, 41

Cal. 242. A court of equity may enjoin further proceedings in the action, but the power will not be exercised unless certain and irreparable injury will result if such power is not exerted. *Crawford* v. *Paine*, 19 Iowa, 172; *Lamb* v. *Drew*, 20 id. 15.

§ 10. **Verdict.** A verdict by a jury, in an action for a forcible entry and detainer, that the defendant is guilty of withholding the possession, does not warrant a judgment for the plaintiff, such a finding not being responsive to the complaint. The forcible entry should be proved. *Wall* v. *Goodenough*, 16 Ill. 415; *Preston* v. *Kehoe*, 15 Cal. 315. And see *Snedeker* v. *Quick*, 7 Halst. (N. J.) 129. This is the rule in some of the States, but in a proceeding for forcible entry and detainer in Kentucky, the finding of either is sufficient. *Swartzwelder* v. *U. S. Bank*, 1 J. J. Marsh. (Ky.) 38. And see *Case* v. *Roberts*, 4 Dana (Ky.), 596. So, in proceedings for forcible entry *or* detainer, the finding of a forcible entry *and* detainer is good (*M'Brayer* v. *Wash*, 6 J. J. Marsh. 464); as is also a finding of the detainer simply. *Carpenter* v. *Shepherd*, 4 Bibb (Ky.), 501. But in a proceeding for forcible detainer, a verdict for forcible entry is erroneous. *Sinclair* v. *Sanders*, 3 J. J. Marsh. 303. See *People* v. *Fields*, 1 Lans. 222, 231; *Raymond* v. *Bell*, 18 Conn. 81.

A general verdict, in effect, finds every essential fact necessary to authorize it, and it need not, therefore, mention the withholding of the possession at the institution of the suit. *Gorman* v. *Steed*, 1 West Va. 1. But in North Carolina, before a writ of restitution can be awarded, the jury must find by their verdict that the party forcibly dispossessed had either a freehold or a term for years in the land. *State* v. *Anders*, 8 Ired. 15. And where the verdict was, "and we the jurors do hereby decide that the said A. S., plaintiff and *owner of said house*, etc., do give him full possession of the same,"—it was held, that such description was insufficient. *Grissett* v. *Smith*, Phil. (N. C.) L. 164. In some of the States a verdict for the plaintiff must state that the premises are detained *by force*. See *Boxley* v. *Collins*, 4 Blackf. (Ind.) 320; *Bull* v. *Olcott*, 2 Root (Conn.), 472. In Illinois, a verdict of "guilty" was held sufficient. *Smith* v. *Killeck*, 5 Gilm. (Ill.) 293. Upon a trial for an unlawful detainer in Mississippi, it must appear affirmatively in the record, that the jury were sworn; and the mere recital that the jury find upon their oaths, is insufficient. *Holt* v. *Mills*, 4 Sm. & M. 110. See, also, *State* v. *Putnam*, Coxe (N. J.), 260. In Ohio, a verdict which contains the substance of the requirements of the statute is sufficient. *Murphy* v. *Lucas*, 2 Ohio, 255. A verdict, that "we the jury find the defendants guilty of the wrongful detainer, in manner and form as the plaintiff in his complaint hath

alleged," is in proper form to be supported by the allegation in the complaint, "that the said defendants unlawfully hold by force." *Altree* v. *Moore*, 1 Oreg. 350.

§ 11. **Damages.** Where a statute does not explicitly direct otherwise, the jury, in an action of unlawful detainer, should assess the value of the rent. And to authorize a court to take such questions from the jury, the law should be clear and imperative. *Spear* v. *Lomax*, 42 Ala. 576. Under the statute of Missouri, in case of a verdict for the plaintiff, the jury may assess damages for all waste and injury committed upon the premises as well as for all rents and profits up to the time of the rendition of the verdict. *Eads* v. *Wooldridge*, 27 Mo. 251. But the damages allowed cannot exceed the sum specifically claimed by the plaintiff. *Moore* v. *Dixon*, 50 id. 424. In California, the value of the rents and profits may be recovered without being averred in the complaint (*Holmes* v. *Horber*, 21 Cal. 55); and so, as to treble damages. *Tewksbury* v. *O'Connell*, 25 Cal. 262. The authority given by the Michigan statute to treble the damages does not extend to acts of mere trespass, nor to the value of personal property within the premises entered and detained. *Shaw* v. *Hoffman*, 25 Mich. 162. In Tennessee, the plaintiff is entitled to recover damages, as an incident to the recovery of possession in this form of action except for injuries to the freehold. *White* v. *Suttle*, 1 Swan (Tenn.), 169

§ 12. **Judgment.** The action of forcible entry and detainer, under the statute of Illinois, is purely a civil remedy, the sole object of which is to regain a possession which has been invaded; and the only judgment that can be rendered is, that the plaintiff have restitution of the premises of which he has been unjustly deprived. *Robinson* v. *Crummer*, 10 Ill. 218. A writ of restitution cannot be ordered on conviction in a criminal process. *State* v. *Walker*, 5 Sneed (Tenn.), 259.

Where, on a writ of forcible detainer, judgment was rendered for the plaintiff, but judgment for restitution was omitted, it was held that the court might amend, at a subsequent term, by entering judgment for restitution. *Norton* v. *Sanders*, 7 J. J. Marsh. (Ky.) 12. And a defective description in the judgment entry may be aided by a reference to the sufficient description in the complaint, so as to render the judgment entry also sufficient. *House* v. *Camp*, 32 Ala. 541.

An entry in the following words,—"Parties appeared, ready for trial. After hearing the evidence the court declares in favor of the plaintiff, against the defendant. Costs taxed to defendant, $6.85,"—was held to be an insufficient recital of a judgment for the restitution of premises. *Allen* v. *Corlew*, 10 Kans. 70.

A judgment for unlawful detainer under the Alabama Code is no bar to an action for previous damages, not therein included. *Belshaw* v. *Moses*, 49 Ala. 283.

§ 13. **Writ of restitution.** The writ of restitution obtained in an action of forcible entry and detainer does not determine either the right of property or the right of possession. *Mitchell* v. *Hagood*, 6 Cal. 148. A successful plaintiff in such an action should not, therefore, be restrained from having restitution, for the reason that the defendant has recovered judgment in ejectment for the premises. *Dedman* v. *Smith*, 2 A. K. Marsh. (Ky.) 260.

Upon quashing the proceedings in forcible entry and detainer, it is a general rule to award a writ of restitution, and the court will not, upon a motion for that purpose, suffer the merits of the controversy to be examined into. But the writ is not demandable as a matter of strict right; and where the case itself shows that the issuing of it would work manifest oppression and injustice, it will be refused. *Watson* v. *Trustees of Floral College*, 2 Jones (N. C.), 211.

Where a party has been put out of possession of land by an abuse of the process of law, there must be restitution as a matter of course, unless some new matter has intervened in the meantime. *Perry* v. *Tupper*, 71 N. C. 385; *Perry* v. *Tupper*, 70 id. 538.

CHAPTER LXXI.

FORECLOSURE.

TITLE I.

OF FORECLOSURE IN GENERAL.

ARTICLE I.

GENERAL RULES AS TO FORECLOSURES.

Section 1. Nature and definition. Foreclosure is one of the remedies of a mortgagee; and a general definition of a foreclosure is "the process by which a mortgagee himself acquires, or transfers to a purchaser, an absolute title to the property, of which he has previously been only the conditional owner, or upon which he has previously had a mere lien or incumbrance." 2 Hill. on Mort. 1. See *McCormick* v. *Wilcox*, 25 Ill. 274; *Goodman* v. *White*, 26 Conn. 322; *Weiner* v. *Heintz*, 17 Ill. 259; *Packer* v. *Rochester, etc., R. R. Co.*, 17 N. Y. (3 Smith) 287. It has been said that "the right to foreclose and the right to redeem are reciprocal and commensurable." ROBERTSON, C. J. in *Caufman* v. *Sayre*, 2 B. Monr. (Ky.) 206. The mortgagor may redeem his estate whenever he pleases, by the full payment of the principal and interest of the debt, without any impediment from the legal forfeiture by non-payment at a day limited by the condition, unless he is precluded by the decree of the court, or suffers the lapse of time to raise a presumption to bar his right. And the mortgagee on his part may, at any time after the debt becomes due, and a default is made in the payment of it according to the terms of the contract, exhibit his bill in a court of equity against the mortgagor, and compel him to redeem by the payment of the debt, or to submit to a foreclosure or sale of the mortgaged premises for the satisfaction of it. See *Lansing* v. *Goelet*, 9 Cow. 346, 351; *Hughes* v. *Edwards*, 9 Wheat. 499; *Van Husan* v. *Kanouse*, 13 Mich. 303. The ordinary limitation of the right of redemption is twenty years from the time of taking possession after condition broken, and the mortgagor will not then be admitted to redeem without special cause. 2 Story's Eq. Jur., § 1028; *Ayres* v. *Waite*, 10 Cush. 72; *Gates* v. *Jacob*, 1 B. Monr.

(Ky.) 309. The right of process of foreclosure by the mortgagee may likewise be lost from lapse of time. And where the mortgagor has been suffered to occupy the mortgaged premises for more than twenty years after the debt is due and payable, without any entry or claim by the mortgagee, it will bar the claim of the latter, on the presumption that he has been paid. *Howland* v. *Shurtleff*, 2 Metc. (Mass.) 26. And see *Fry* v. *Shehee*, 55 Ga. 208.

In addition to the mode of barring or foreclosing an equity of redemption by lapse of time, as above noticed, two general methods are provided by law, independent of statutory regulation. One mode is a *strict foreclosure*, which is said to be adopted only where the interests of both parties require it (*Johnson* v. *Donnell*, 15 Ill. 97); and the other mode is a sale of the property to the highest bidder, under the direction of an officer of the court, in which case the proceeds are applied to the discharge of incumbrances according to priority, and the balance, if any, is paid over to the mortgagor. See id.; *Lansing* v. *Goelet*, 9 Cow. 352, 355, 356. This practice of foreclosing by a sale prevails very generally in the United States. See *Mussina* v. *Bartlett*, 8 Port. (Ala.) 288; *Hord* v. *James*, 1 Overt. (Tenn.) 201; 4 Kent's Com. 181. And land mortgaged in fee may be sold under a foreclosure, as well as personal property, and estates for years in land. *Lansing* v. *Albany Ins. Co.*, Hopk. Ch. 102, 104. In general, a mere strict foreclosure is a severe remedy. Its effect is to extinguish the right of redemption, and to transfer the absolute title without any sale no matter what may be the value of the premises. *Bradley* v. *Chester Valley R. R. Co.*, 36 Penn. St. 141, 150; *Bolles* v. *Duff*, 43 N. Y. (4 Hand) 469, 474; S. C., 10 Abb. (N. S.) 399; 41 How. 355. So where, instead of a strict foreclosure, the premises are sold to the highest bidder, under the direction of an officer of the court, the effect is the same as that of a strict foreclosure to extinguish the equity of redemption, and to leave the title conveyed by the mortgagee absolute. *Packer* v. *Rochester, etc., R. R. Co.*, 17 N. Y. (3 Smith) 287; *Shricker* v. *Field*, 9 Iowa, 366; *Weiver* v. *Heintz*, 17 Ill. 259. And see *Mendenhall* v. *West Chester, etc., R. R. Co.*, 36 Penn. St. 146, n.

The last two modes of foreclosure have, to a great extent, been superseded in the several States of the Union by the enactment of statutory provisions upon the subject, which vary in the different States. And where a mode of foreclosure is provided by statute, an agreement contained in the mortgage itself, that it should be foreclosed in some other way than that prescribed, would be entirely ineffectual. *Chase* v. *McLellan*, 49 Me. 375. The provisions of the statute must be strictly pursued. *Williamson* v. *Crawford*, 7 Blackf. (Ind.) 12. In

some of the States, concurrent proceedings are allowed at law and in equity; and, as a general rule, the mortgagee may at the same time, and in different actions, proceed to enforce the mortgage and the debt secured thereby. See *Satterwhite* v. *Kennedy*, 3 Strobh. (S. C.) L. 457; *Payne* v. *Harrell*, 40 Miss. 498; *Hale* v. *Rider*, 5 Cush. 231; *Booth* v. *Booth*, 2 Atk. 343; *Jones* v. *Conde*, 6 Johns. Ch. 77; *Equitable Life Ins. Soc.* v. *Stevens*, 63 N. Y. (18 Sick.) 341, 344. Nor does it follow that he may not recover in one form of action because of a technical difficulty in the way of a recovery in the other. And it has been held, that where a mortgage was given to secure the payment of a single contract debt, the statute limiting the time for commencing actions for the recovery of such debts was no bar to an action to foreclose the mortgage. *Thayer* v. *Mann*, 19 Pick. 535; *Elkin* v. *Edwards*, 8 Ga. 325; *Heyer* v. *Pruyn*, 7 Paige, 465; *Borst* v. *Corey*, 15 N. Y. (1 Smith) 505; *Nevitt* v. *Bacon*, 32 Miss. 212. But see, *contra*, *McCarthy* v. *White*, 21 Cal. 495. What is known as "a strict foreclosure" has no place in the Iowa system of procedure. *Gamut* v. *Gregg*, 37 Iowa, 573. And in New York, strict foreclosures are now rarely pursued or allowed, except in cases where a foreclosure has once been had and the premises sold, but some judgment creditor, or person similarly situated, not having been made a party, has a right to redeem. As to him, a strict foreclosure is proper. *Bolles* v. *Duff*, 43 N. Y. (4 Hand) 469, 474. Nor is the strict foreclosure, which is common in England, and in some of the States, recognized in Missouri. And, although in consequence of improvements put on the land by the mortgagee, or the purchaser from him, the mortgagor may be unable to redeem, yet, if the land and improvements will overpay the debt, and the value of the improvements, after deducting the rents and profits, the mortgagor or his heirs are entitled to whatever surplus may result from a sale. *Davis* v. *Holmes*, 55 Mo. 349.

In some of the States, the mode of foreclosure is the English system of bill and decree in equity. See *Smith* v. *Anders*, 21 Ala. 782; *Crutchfield* v. *Coke*, 6 J. J. Marsh. (Ky.) 89; *Ingram* v. *Smith*, 6 Ired. (N. C.) Eq. 97; *Champenois* v. *Fort*, 45 Miss. 355; *Armstrong* v. *Ross*, 20 N. J. Eq. 109; *Price* v. *State Bank*, 14 Ark. 50. In others, the proceedings take the form of a real action or ejectment. See *Peck* v. *Hapgood*, 10 Metc. (Mass.) 173; *Martin* v. *Jackson*, 27 Penn. St. 504. And in others, of petition or *scire facias*, provided as a summary remedy, and adapted solely to this particular case. Id.; *McFadden* v. *Fortier*, 20 Ill. 509; *Russell* v. *Brown*, 41 id. 183.

ARTICLE II.

WHAT CLAIMS MAY BE FORECLOSED.

Section 1. In general. The remedy of the mortgagee by process of foreclosure is not confined to the mortgagor's right to redeem in cases of mortgages of land, but also extends to mortgages of personal property, and to pledges of, and liens upon, chattels.

§ 2. **Mortgages of real property.** It has been held that a mortgage of the undivided interest of the mortgagor in land which he owns jointly with another, may be foreclosed, and the undivided interest sold. *Baker* v. *Shephard*, 30 Ga. 706. So, where there are two co-mortgagees, and one has become the owner of the equity of redemption, the other can sustain a bill for a foreclosure against him, to the extent of his proportionate interest. *Sandford* v. *Bulkley*, 30 Conn. 344. And where a joint mortgage for a joint and several debt is made by two tenants in common, the mortgagee is entitled to a foreclosure of the whole estate; and he cannot be compelled, in equity, to receive from one of the mortgagors his share of the debt, and to proceed against the other for the other half, although a bond of indemnity is tendered to him. *Frost* v. *Frost*, 3 Sandf. Ch. 188.

A mortgagee may legally hold two mortgages, on different pieces of land, for the security of the same debt, and may foreclose his mortgage on one piece without the other ; and whether a foreclosure on one will bar a foreclosure on the other depends upon the value of the premises foreclosed. *Burpee* v. *Parker*, 24 Vt. 567. But a bill to foreclose a mortgage on real estate will not lie, if it appear that the mortgage also covers personal property sufficient to satisfy the mortgage debt. *Koger* v. *Weakly*, 2 Port. (Ala.) 516. Nor can a mortgage foreclosure be had as to one part of the mortgaged premises, and not as to the residue. If the mortgagor has a right to redeem any part, he has a right to redeem the whole. *Spring* v. *Haines*, 21 Me. 126.

A mortgagee may enforce his mortgage as against the land, notwithstanding the personal liability of the mortgagor for the debt may be barred by a discharge in insolvency. *Christy* v. *Dana*, 42 Cal. 174. And see *Borst* v. *Corey*, 15 N. Y. (1 Smith) 505.

§ 3. **Mortgages of chattels.** See *ante*, Vol. 2, p. 205, *et seq.;* and *post*, title 3, art. 1.

§ 4. **Pledges of chattels.** In cases of pledges of chattels, it seems that by the common law at an early period, the pledgee might, at any time, bring a suit to compel the pledgor to redeem at a given day ; and, upon failure to do so, he was forever foreclosed of his right to redeem. See 4 Kent's Com. 138 ; *Cortelyou* v. *Lansing*, 2 Caines' Cas. 200. But

the usual course now is, by a bill in equity to foreclose and sell the pledge, in which case an absolute title passes to the vendee. 4 Kent's Com. 139; Story on Bailm., § 308; *Ex parte Mountfort*, 14 Ves. 606. See *post*, 424, title 4.

§ 5. **Liens upon chattels.** A lien upon a chattel is said to be, in many respects, like a distress at common law, and gives the party detaining the chattel the right to hold it as a pledge or security for the debt, and not to sell it. 2 Kent's Com. 642. And see *Pothonier* v. *Dawson*, 1 Holt's N. P. 383. And it has been supposed that the remedy to enforce the lien is by action in the nature of a bill in chancery. Id. But see *Trust* v. *Pirsson*, 1 Hilt. (N. Y.) 292; S. C., 3 Abb. Pr. 84. Such was held to be an innkeeper's remedy to enforce a lien for keeping the horse of his guest. *Fox* v. *McGregor*, 11 Barb. 41. But in many of the States the remedy in such cases is now a matter of statutory regulation. See *Young* v. *Kimball*, 23 Penn. St. 193. In *Case* v. *Fogg*, 46 Mo. 44, it was held that an innkeeper had no power to enforce a lien, by sale, on the baggage of a guest, without judicial process.

TITLE II.

FORECLOSURE OF MORTGAGES OF REAL PROPERTY.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Nature and definition. The foreclosure of a mortgage of real estate is the process adopted by the mortgagee, for cutting off all further right to redeem by the mortgagor, whereby the estate becomes the absolute property of the mortgagee. The remedy is founded upon the equitable principle, that the mortgagee should not be subject to a perpetual account, nor converted into a perpetual bailiff, but that, after a fair and reasonable time given to the mortgagor to discharge the debt, he should lose his equity, or, in other words, be foreclosed his right of redemption. See Coote on Mortg. 510. This is brought about by a bill in equity, and the proceeding is known as a strict foreclosure. In England, it is deemed, in common cases, the exclusive and appropriate remedy, and in the New England States, the practice of a strict foreclosure would seem to prevail. But by statute in England (Stat. 15 and 16 Vict., ch. 86, § 48), the court may always direct a sale of the property at the request of either party, instead of decreeing a

foreclosure (Williams on Real Prop. 356); and a practice adopted in many of the American courts of equity is, first, to direct a sale of the mortgaged property, giving the debtor any surplus after discharging the mortgage debt; and second, to apply the remedy of foreclosure only to special cases, where the former remedy would not apply, or might be inadequate or injurious to the interests of the parties. 2 Story's Eq. Jur., § 1025; *Mills* v. *Dennis*, 3 Johns. Ch. 369. And see *ante*, 417, title 1, art. 1, § 1, and cases there cited. The inconveniences attendant upon strict foreclosure in England are so strongly felt, that it has become an established practice to insert in mortgages, a power of sale upon default of payment. See *In re Chawner*, L. R., 8 Eq. 569; *In re Richardson*, L. R., 12 Eq. 398; *Corder* v. *Morgan*, 18 Ves. 344; 4 Kent's Com. 146.

§ 2. **What is a mortgage of real estate?** "A mortgage," as defined by Chancellor KENT, "is the conveyance of an estate, by way of pledge for the security of debt, and to become void on payment of it." 4 Kent's Com. 133. Or, a mortgage is a conditional conveyance of land, designed as a security for the payment of money, the fulfillment of some contract or the performance of some act, and to be void upon such payment, fulfillment, or performance. APPLETON, J., in *Mitchell* v. *Burnham*, 44 Me. 286, 299. And see *Steel* v. *Steel*, 4 Allen, 419; *Somersworth* v. *Roberts*, 38 N. H. 24; *Wing* v. *Cooper*, 37 Vt. 179; *Elfe* v. *Cole*, 26 Ga. 197. It has been said that a mortgage is always founded on a *loan*. *Chapman* v. *Turner*, 1 Call. (Va.) 252. See Vol. 2, 165. But see *Byram* v. *Gordon*, 11 Mich. 531. A defeasance, either written in the instrument or in a separate writing, or established by parol, is essential to a mortgage. Without a valid agreement binding the grantee to reconvey or yield up to the grantor when the condition shall have been performed, it is not a mortgage. And the mortgagor must be a party having an interest in the land at the time of the transaction. *Payne* v. *Patterson*, 77 Penn. St. 134. But to constitute a mortgage it is not necessary that there should be any collateral or personal security for the debt secured by the mortgage. *Smith* v. *People's Bank*, 24 Me. 185. An absolute deed will be valid and effectual as a mortgage, if it clearly appears that it was designed as a security for money. And this may be shown to be the intention and effect of the deed, by a cotemporaneous or subsequent writing, or by an agreement resting in parol. *Littlewort* v. *Davis*, 50 Miss. 403; *O'Neill* v. *Capelle*, 62 Mo. 202; *Phillips* v. *Hulsizer*, 20 N. J. Eq. 308; *Weide* v. *Gehl*, 21 Minn. 449. So, courts of equity in England and in this country have held, that an agreement based upon a valuable consideration to give a mortgage, will be treated

in equity as a mortgage. And it is said, that this doctrine has been acted on so frequently and for so long a period of time that it may justly be regarded as forming a part of the law of the land. *Russel* v. *Russel*, 1 Bro. C. C. 269; *Bank* v. *Carpenter*, 7 Ohio, 21; *Welsh* v. *Usher*, 2 Hill's (S. C.) Eq. 167; *Burdick* v. *Jackson*, 7 Hun (N. Y.), 488. Such an agreement raises a trust which binds the estate to which it relates, and all who take title thereto, with notice of such trust, can be compelled in equity to fulfill it. *Pinch* v. *Anthony*, 8 Allen, 539; *Daggett* v. *Rankin*, 31 Cal. 326.

A conveyance in the form of a deed of trust to secure the payment of a promissory note, and conditioned, that in case of failure to pay, the trustee shall sell, or, upon payment, reconvey, is held to be, in effect, a mortgage. *Webb* v. *Hoselton*, 4 Neb. 308; 19 Am. Rep. 638. So, where a lien on land conveyed is expressly reserved in the deed, which is duly recorded, it creates a clear equitable mortgage, of which every one is bound to take notice; and the purchaser of the land at a sheriff's sale takes nothing more than an equity of redemption, and holds the land subject to the lien for the unpaid purchase-money. *Davis* v. *Hamilton*, 50 Miss. 213.

This branch of the subject will be more fully treated of in a subsequent title. See *post*, title *Mortgages of Real Estate.*

§ 3. **When a mortgage is due or forfeited.** The respective rights of the mortgagor and of the mortgagee in the land mortgaged have been the subject of much discussion, and it is said to be impossible to reconcile all that learned judges and writers have said upon the subject. By the common law of England the legal estate vested in the mortgagee, to be defeated by the performance of a condition subsequent, to wit, payment at the law day. In default of such payment, the title became absolute and irredeemable in the mortgagee. But, at an early day, courts of equity assumed jurisdiction to relieve mortgagors against forfeitures, and, thenceforth, in equity a mortgage has been regarded as a mere security, as creating an interest in the mortgaged premises of a personal nature, like that which the mortgagee has in the debt itself. The common law rule, as thus modified by equitable principles, still prevails in England. There the courts still hold that the legal title passes to the mortgagee, and becomes by default absolutely vested in him at law, and that the mortgagor has, after default, nothing but an equity of redemption to be enforced in a court of equity. After default the mortgagor can again become reinvested with the title to his land only by a reconveyance by the mortgagee. See *Waters* v. *Stewart*, 1 Caines' Cas. 67; *Trimm* v. *Marsh*, 54 N. Y. (9 Sick.) 599, 603; 13 Am. Rep. 623. The same rule also prevails in the New England States,

and in some of the other States of the Union. See *Smith* v. *Johns*, 3 Gray, 517; *Stewart* v. *Crosby*, 50 Me. 130; *Simmons* v. *Brown*, 7 R. I. 427; *Norwich* v. *Hubbard*, 22 Conn. 587, 594; *Swartz* v. *Leist*, 13 Ohio St. 419; *Northy* v. *Northy*, 45 N. H. 141. But this common law rule has never, to its full extent, been adopted in some of the States. Thus, in New York, the mortgagor has, both in law and equity, been regarded as the owner of the fee, and the mortgage has been regarded as a mere chose in action, a mere security of a personal nature. *Power* v. *Lester*, 23 N. Y. (9 Smith) 527, 531; *Trustees of Union College* v. *Wheeler*, 61 N. Y. (16 Sick.) 88, 118. See, also, *Ladue* v. *Detroit, etc., R. R. Co.*, 13 Mich. 380; *Burton* v. *Hintrager*, 18 Iowa, 348; *Fletcher* v. *Holmes*, 32 Ind. 497; *Dutton* v. *Warschauer*, 21 Cal. 609.

§ 4. **Excusing forfeiture or foreclosure.** If the condition of a bond and mortgage be that the principal shall be payable on failure to pay an installment of interest when due, a neglect to pay such an installment when it becomes due works a forfeiture of the mortgage. *Ottawa Northern Plank Road Co.* v. *Murray*, 15 Ill. 336; *Voorhis* v. *Murphy*, 26 N. J. Eq. 434. See, also, *Mobray* v. *Leckie*, 42 Md. 474. And a court of equity has no power to grant relief in such a case of default. On the other hand, the court is bound to give effect to the bond according to the proviso in its condition. *Hale* v. *Gouverneur*, 4 Edw. Ch. 207; *O'Connor* v. *Shipman*, 48 How. (N. Y.) 126. So where a mortgage contains a clause authorizing the mortgagee, upon non-payment of interest for a certain number of days after it becomes due, to elect that the whole amount unpaid shall become due, after a default has occurred, and the mortgagee has made his election in accordance with the stipulation, he cannot be compelled to accept the interest and waive the stipulation. *Malcolm* v. *Allen*, 49 N. Y. (4 Sick.) 448. See *Rubens* v. *Prindle*, 44 Barb. 336; *Ferris* v. *Ferris*, 28 Barb. 29; as to waiver, see *Wilson* v *Bird*, 28 N. J. Eq. 352.

It is likewise held, that if a mortgage be given to secure the payment of a note, payable by installments, and any of the installments be not paid as they become due, it will be a breach of the condition of the mortgage, and the mortgagee may thereupon have his action to recover possession of the land mortgaged. *Estabrook* v. *Moulton*, 9 Mass. 258. But where the principal will become due at the election of the mortgagee, when default has been made in the payment of an installment, it is held that the mortgagee must give notice of that option before suing for the whole. *Basse* v. *Gallegger*, 7 Wis. 442.

It is a well-settled principle, that if a mortgage be given for a specific purpose, it must be exclusively applied to that purpose. *Phillips* v. *Thompson*, 2 Johns. Ch. 418. And any other disposition

of the security is a fraudulent misappropriation, against which the mortgagor is entitled to relief in equity. *Andrews* v. *Torrey*, 14 N. J. Eq. 355.

In respect to the equity of redemption, it is regarded as so inseparable from a mortgage, that it cannot be disannexed, even by express agreement of parties. *Holridge* v. *Gillespie*, 2 Johns. Ch. 33; *Seton* v. *Slade*, 7 Ves. 273; 2 Story's Eq. Jur., § 1019. And a stipulation in a mortgage by which a mortgagor's equity of redemption is to be cut off upon failure to perform the condition by a particular time would be utterly void. *Quartermous* v. *Kennedy*, 29 Ark. 544, And see *Clark* v. *Condit*, 18 N. J. Eq. 358; *Rankin* v. *Mortimeer*, 7 Watts (Penn.), 372; *Robinson* v. *Farrelly*, 16 Ala. 472. So, equity. will afford relief against a sale of an equity of redemption to the mortgagee, for a grossly inadequate price. *McKinstry* v. *Conly*, 12 Ala. 678. And see *Hyndman* v. *Hyndman*, 19 Vt. 9; *Perkins* v. *Drye*, 3 Duv. (Ky.), 175; *Chapman* v. *Mull*, 7 Ired. (N. C.) Eq. 292. But there is no rule or policy that precludes a mortgagee from making a *bona fide* purchase of the equity of redemption, and from thereby acquiring an absolute title. *Hinkley* v. *Wheelwright*, 29 Md. 341; *Green* v. *Butler*, 26 Cal. 595; *Wynkoop* v. *Cowing*, 21 Ill. 570. And after a mortgage has become payable, the mortgagor may convey the mortgaged premises to the mortgagee, absolutely, in payment of the debt, provided there is no fraud in the transaction. *Shelton* v. *Hampten*, 6 Ired. (N. C.) L. 216.

§ 5. **Who may foreclose.** If the mortgagee is dead, his personal representative is the proper party to institute the foreclosure suit, for ordinarily the mortgage money belongs to the personal estate or assets of the mortgagee, and draws after it the mortgaged estate as an incident. *Bradshaw* v. *Outram*, 13 Ves. 234; *Griffin* v. *Lovell*, 42 Miss. 402; *Roath* v. *Smith*, 5 Conn. 133; *Grattan* v. *Wiggins*, 23 Cal. 16; *Buck* v. *Fischer*, 2 Col. T. 182. See *Smith* v. *Webb*, 1 Barb. 230. So, it has been held that the representatives of deceased joint mortgagees must be made parties, and that it is not sufficient to make a surviving mortgagee party alone. *Smith* v. *Trenton, etc., Falls Co.*, 3 Green's Ch. (N. J.) 505. But the opposite of this has been held. See *Blake* v. *Sanborn*, 8 Gray, 154; *Williams* v. *Hilton*, 35 Me. 547. And the prevailing rule would seem to be, that, after the death of a joint mortgagee, a suit to foreclose is to be brought by the survivor alone, unless an interest is disclosed in some other person, and that the representatives of the deceased are not proper parties. *Erwin* v. *Ferguson*, 5 Ala. 158; *Milroy* v. *Stockwell*, 1 Cart. (Ind.) 35; *Martin* v. *McReynolds*, 6 Mich. 70; *Wiley* v. *Pinson*, 23 Tex. 486.

Where a mortgage is made to two jointly to secure their several debts, the mortgagees may join in a suit to foreclose the mortgage. *Shirkey* v. *Hanna*, 3 Blackf. (Ind.) 403; *Pogue* v. *Clark*, 25 Ill. 351. But see *Thayer* v. *Campbell*, 9 Mo. 280. And several mortgagees, who are joint tenants of the same property, must be parties to a foreclosure. *Lowe* v. *Morgan*, 1 Bro. Ch. Cas. 368; *Palmer* v. *Carlisle*, 1 Sim. & Stu. 423; *Webster* v. *Vandeventer*, 6 Gray, 428. So, if one partner receives a mortgage in his own name for a partnership debt, he must join the others in a bill to foreclose. *Noyes* v. *Sawyer*, 3 Vt. 160; *Pomeroy* v. *Latting*, 2 Allen, 221. A holder of lands which are secured by mortgage may institute a suit of foreclosure in behalf of himself and other bondholders, and in such case the rights of absent parties will be carefully protected by the court. *Mason* v. *York, etc., R. R. Co.*, 52 Me. 82. Where a mortgage was given by a corporation to trustees for the benefit of such persons as should thereafter furnish materials, it was held, that, as the interests of the material-men were several, their rights were several, and, therefore, that either one might maintain a suit to enforce the mortgage to the extent of his debt, without joining the trustees, or any one else, unless they had existing interests which required to be adjusted. *Tyler* v. *Yreka Water Co.*, 14 Cal. 212.

In Louisiana, the holder of promissory notes secured by mortgage on real estate, importing a confession of judgment, may proceed *in rem* after the mortgagee has died, to foreclose the mortgage without provoking the appointment of an administrator to represent the succession. *Randolph* v. *Chapman*, 21 La. Ann. 486.

A suit for the foreclosure of a mortgage cannot be maintained in the name of the mortgagee for the use of an assignee. *Barraque* v. *Manuel*, 7 Ark. 516. And the foreclosure of a mortgage by a person not the mortgagee, where no assignment has been made, is absolutely void. *Bolles* v. *Carli*, 12 Minn. 113. But if a mortgagee has assigned his entire interest in the mortgage, his assignee may maintain the suit for foreclosure in his own name without joining the original mortgagee. *Whitney* v. *M'Kinney*, 7 Johns. Ch. 144; *McGuffey* v. *Finley*, 20 Ohio, 474; *Miller* v. *Henderson*, 2 Stockt. (N. J.) Ch. 320. And see *Wynn* v. *Ely*, 8 Fla. 232.

When a mortgage is held and owned by the wife, as her separate property, the husband cannot properly be joined as a co-plaintiff to foreclose it; but the objection should be taken by demurrer, and, if not so taken it cannot be insisted upon at the hearing. *Bartlett* v. *Boyd*, 34 Vt. 256.

§ 6. **Defendants in foreclosure.** In order to make a person defend-

ant in equity proceedings to foreclose a mortgage, it must be alleged that he either has or claims some interest in the property. *Martin* v. *Noble*, 29 Ind. 216. And see *Hall* v. *Hall*, 11 Tex. 526; *Matcalm* v. *Smith*, 6 McLean (C. C.), 416; *Goodman* v. *White*, 26 Conn. 322. Persons who have an interest in the property, but who are not made parties to the suit or proceedings, will not in general be bound. *Calverley* v. *Phelps*, 6 Madd. 232; *Howard* v. *Gresham*, 27 Ga. 347; *Hull* v. *Lyon*, 27 Mo. 570; *Bache* v. *Doscher*, 67 N. Y. (22 Sick.) 429. Nor can a third person, who is not a party to the record, object to the relief prayed for, until he has regularly been made a party to the suit. *McDougald* v. *Hall*, 3 Kelly (Ga.), 174.

The person who holds the legal title to the mortgaged premises, whether he is the mortgagor, or the grantee, heir, or devisee of the mortgagor, is always a necessary party. Such person holds the "equity of redemption," which must be "foreclosed" in order to pass the whole estate, legal and equitable, to the purchaser under the decree for the foreclosure and sale of the mortgaged premises. *Lennox* v. *Reed*, 12 Kans. 223. And see *Boggs* v. *Hargrave*, 16 Cal. 559; *Hall* v. *Nelson*, 23 Barb. 88; S. C., 14 How. 32; *Hall* v. *Huggins*, 19 Ala. 200; *Ohling* v. *Luitjens*, 32 Ill. 23. See, also, *So. Car. Manuf. Co.* v. *Price*, 4 S. C. 338. And the mortgagor is held to be a necessary party, although the remedy against him personally is barred by the statute of limitations. *Michigan* v. *Brown*, 11 Mich. 265. But a mortgagor who has disposed of his equity of redemption is not necessarily a proper party to the foreclosure. *Murray* v. *Cutlett*, 4 Greene (Iowa), 108. See *Pruden* v. *Williams*, 26 N. J. Eq. 220; *Jones* v. *Lapham*, 15 Kans. 540.

Where the statute is silent as to the necessity of making a junior mortgagee a party, the rule applicable is, that all incumbrancers, as well as the mortgagor, should be made parties; they being, if not indispensable, at least proper parties to the suit, whether they are prior or subsequent incumbrancers. See *Haines* v. *Beach*, 3 Johns. Ch. 459; *Besser* v. *Hawthorn*, 3 Oreg. 129; *Same* v. *Same*, id. 512. If any incumbrancers, whether prior or subsequent, are not made parties, the decree of foreclosure does not bind them. Id.; *Bache* v. *Doscher*, 67 N. Y. (22 Sick.) 429. A junior mortgagee may, under the Maryland Code, foreclose his mortgage without making the prior mortgagee a party to the proceeding. *Tome* v. *Merchants', etc., Co.*, 34 Md. 12. So, in Florida, prior mortgagees are unnecessary parties to an action to foreclose a subsequent mortgage. *Broward* v. *Hoeg*, 15 Fla. 370.

A wife who has joined in her husband's mortgage must be made a party in a suit to foreclose. *Johns* v. *Reardon*, 3 Md. Ch. 57; *Leonard*

v. *Villars*, 23 Ill. 377. And to a suit to foreclose a mortgage given to A and his wife, jointly, brought by the holder of the mortgage, under assignment from A's executor, in which the widow did not join, the widow was held to be a necessary party defendant. *Trades' Saving Bank* v. *Freese*, 26 N. J. Eq. 453. And generally, in those States in which rights of homestead exist in favor of wives, the wife of the owner of the equity of redemption will not be bound by a decree of foreclosure against her husband, unless she is made a party to it. *Moss* v. *Warner*, 10 Cal. 297; *Tadlock* v. *Eccles*, 20 Tex. 782; *Larson* v. *Reynolds*, 13 Iowa, 579, 586. But in Michigan, the wife of the mortgagor is not a necessary party to a bill to foreclose a mortgage given by the husband alone at the time of his purchase, notwithstanding she claims a homestead right in the premises. *Amphlett* v. *Hibbard*, 29 Mich. 298. In Tennessee, the widow of the mortgagor is not a necessary party defendant (*Mims* v. *Mims*, 1 Humph. [Tenn.] 425); nor is the wife of the grantee of the mortgagor a necessary party in Missouri (*Thornton* v. *Pigg*, 24 Mo. 248); while she must be made a party in New York. *Mills* v. *Van Voorhis*, 23 Barb. 125; *Northrup* v. *Wheeler*, 43 How. (N. Y.) 122. See, also, *Merchants' Bank* v. *Thomson*, 55 N. Y. (10 Sick.) 7. In North Carolina, the wife of a mortgagor has no such interest in the lands mortgaged, as to make it necessary that she should be a party to a proceeding to foreclose the mortgage. *Etheridge* v. *Vernoy*, 71 N. C. 184.

In Illinois, foreclosure proceedings may be against the heir, or the executors or administrators of the mortgagee, at the plaintiff's election. *Rockwell* v. *Jones*, 21 Ill. 279.

In California, the grantee of the mortgagor, who takes his conveyance after a *lis pendens* has been filed in a foreclosure suit, or who buys before the suit is commenced, but does not record his deed until after the suit is commenced, is bound by the judgment of foreclosure, although not made a party to the action. *Daniels* v. *Henderson*, 49 Cal. 245. So, if the mortgagor, after the execution of the mortgage, makes a conveyance of the mortgaged property, and the conveyance is not recorded before foreclosure proceedings are commenced, the grantee need not be made a party defendant, and a judgment against the mortgagor is conclusive against such grantee. *Aldrich* v. *Stevens*, id. 676.

The assignor of a promissory note secured by a mortgage of real estate is neither a necessary or proper party to an action against the maker of the note, to foreclose the mortgage. *Markel* v. *Evans*, 47 Ind. 326.

§ 7. **Relief granted.** The authority to render such judgment or decree as substantial justice between the parties may require, in pro-

ceedings for the foreclosure of a mortgage, is inherent in a court of equity; and by statutory provision, in some of the States, this power exists in a court of law. In general, the only effect of a decree in such a proceeding is, to bar the mortgagor's equity of redemption, leaving the mortgagee to pursue his legal remedies to establish his title to the estate. See *Palmer* v. *Mead*, 7 Conn. 149; *Jones* v. *St. John*, 4 Sandf. Ch. 208. The rule is stated to be, that, so far as mere legal rights are concerned upon a bill of foreclosure, the only proper parties to the suit are the mortgagor and mortgagee, and those who have acquired rights or interests under them subsequent to the mortgage. And the mortgagee has no right to make one who claims adversely to the title of the mortgagor, and prior to the mortgage, a party defendant for the purpose of trying the validity of his adverse claim of title in a court of equity. *Eagle Fire Co.* v. *Lent*, 6 Paige, 637; *Corning* v. *Smith*, 6 N. Y. (2 Seld.) 84; *Chamberlain* v. *Lyell*, 3 Mich. 448; *Lange* v. *Jones*, 5 Leigh (Va.), 192; *McCormick* v. *Wilcox*, 25 Ill. 274; *Elias* v. *Verdugo*, 27 Cal. 418; *Kreichbaum* v. *Melton*, 49 id. 51. A decree in chancery foreclosing a mortgage, if obtained by fraud, is void, and will be so declared on a bill filed by a party whose rights are injuriously affected by it; and an asserted title, founded upon it, is also void. *Eslava* v. *Eslava*, 50 Ala. 31.

In a suit for the foreclosure of a mortgage, unaccompanied by any agreement in writing to pay the debt, the relief is confined to the property. But it is held, that, if the defendant appears and consents that a personal judgment may be rendered, the judgment is valid. *Fletcher* v. *Holmes*, 25 Ind. 458.

A decree in equity should determine the rights and liabilities of all the parties to the cause. It was, therefore, held, upon a bill to foreclose a mortgage, executed by H. and wife, and B. and wife, all of whom had been made defendants, that a decree directing the sale of the interest of H. alone was erroneous. *Hurtt* v. *Crane*, 36 Md. 19.

The foreclosure of a mortgage operates as a payment of the mortgage debt, to the value of the mortgaged property. *Johnson* v. *Candage*, 31 Me. 18; *Doe* v. *M'Loskey*, 1 Ala. 708. But a decree for strict foreclosure does not operate as a satisfaction of the debt, until after the time fixed by the decree for redemption has expired. *Peck's Appeal*, 31 Conn. 115.

It is the well-settled practice in chancery to sustain a bill to enforce the payment of debts secured by mortgage, and payable by installments, before all the installments are due. *Lansing* v. *Capron*, 1 Johns. Ch. 617; *Adams* v. *Essex*, 1 Bibb (Ky.), 150; *King* v. *Longworth*, 7 Ohio (2d Part), 131. But the decree should not inclose

those not yet due. Id. And the rule generally would seem to be, that where a mortgage is foreclosed, which secures a debt payable in installments, of which some are due and others are not due, the court can only direct, as to installments not due, at what time and upon what default any subsequent executions shall issue to make the amounts of installments not due. A personal judgment cannot be legally rendered for a debt which is not due. *Skeltow* v. *Ward*, 51 Ind. 46. See, also, *Smith* v. *Osborn*, 33 Mich. 410; *ante*, § 4. And on this point, see generally, *Magruder* v. *Eggleston*, 41 Miss. 184; *Manning* v. *McClurg*, 14 Wis. 350; *Northy* v. *Northy*, 45 N. H. 141.

TITLE III.

FORECLOSURE OF CHATTEL MORTGAGES.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Nature and definition. A chattel mortgage, as defined *ante*, Vol. 2, p. 165, is a present transfer of the title to the property mortgaged, subject to be defeated on payment of the sum or instrument it is given to secure. In default of performance, by the mortgagor, of the condition, the title of the mortgagee becomes absolute, *at law*. See *Patchin* v. *Pierce*, 12 Wend. 61; *Chamberlain* v. *Martin*, 43 Barb. 607; *Bryant* v. *Carson River Lumbering Co.*, 3 Nev. 313. And this title of the mortgagee is held to be as perfect when the default is in the payment of an installment of the debt, when it is payable in installments, as it is upon default in payment of the whole debt. *Robinson* v. *Wilcox*, 2 N. Y. Leg. Obs. 160; *Halstead* v. *Swartz*, 46 How. (N.Y.) 289; S. C., 1 N.Y. Sup. (T. & C.) 559; *McConnell* v. *Scott*, 67 Ill. 274. But notwithstanding the default of the mortgagor, and the consequent perfection of the legal title in the mortgagee, there is no doubt that, *in equity*, the former has the right to redeem. *Blodgett* v. *Blodgett*, 48 Vt. 32. And see *ante*, Vol. 2, p. 206. And ordinarily, such equity can be extinguished only by a judicial decree, by a sale of the property under the power contained in the mortgage, or, possibly, by lapse of time. *Charter* v. *Stevens*, 3 Denio, 35; *Broadhead* v. *McKay*, 46 Ind. 595; *Kemp* v. *Westbrook*, 1 Ves. 278. If the mortgagee resorts to none of these remedies, the mortgagor may, within a reasonable time after forfeiture, assert his right in equity to redeem. *Stoddard* v. *Dennison*, 38 How. (N.Y.) 296; S. C., 2 Sweeney, 54; 7 Abb. (N. S.) 309.

As the title is absolute at law, in the mortgagee, immediately after default in performing the condition, it is held that he may sell the property, either at public auction or private sale, without notice, and give to his vendee a perfect title. *Chamberlain* v. *Martin*, 43 Barb. 607. Assuming, of course, such sale to be fair and *bona fide*. Id.; *Ballou* v. *Cunningham*, 60 id. 425; *Halstead* v. *Swartz*, 46 How. (N. Y.) 289; S. C., 1 N. Y. Sup. (T. & C.) 559. See, also, *Bryant* v. *Carson*, 3 Nev. 313; *Freeman* v. *Freeman*, 2 A. E. Green (N. J.), 44. So, the mortgagee having the right to the immediate possession of the mortgaged property, after the law day has passed, he may maintain *detinue* against the mortgagor, although the mortgage itself contains no provision authorizing him to take possession. *Mervine* v. *White*, 50 Ala. 388. And see *Stamps* v. *Gilman*, 43 Miss. 456. See Vol. 2, 202, 534.

§ 2. **Right to foreclose in equity.** Instead of proceeding to sell the mortgaged property for the satisfaction of his debt, as pointed out in the preceding section, the mortgagee may, at his election, avail himself of the aid of a court of equity to obtain a foreclosure of the equity of redemption. See *ante*, Vol. 2, p. 205. Thus, in an English case, a mortgagee of a reversionary interest in stock was held entitled to the common decree for foreclosure in default of payment. *Slade* v. *Rigg*, 3 Hare, 35. So, in a subsequent case it was said, that in a mortgage of personal property, as well as in every other, the mortgagor has a right to redeem, and the purpose of a decree of foreclosure is to exclude that right. *Wayne* v. *Hanham*, 9 id. 62. And in a South Carolina case, the ground upon which equity entertains bills for the foreclosure of mortgages of personal property is stated to be, that the property may be sold under the direction of the court; that if it falls short of satisfying the debt, the mortgagee may have a decree for the residue; or, if there should be a surplus, that it may be awarded to the mortgagor, and so put an end to litigation. If the mortgagee himself should sell, there would be, in case of deficiency, an action at law to recover the remainder of the debt; or, if there should be a surplus, the mortgagor might sue for it. But equity avoids this multiplicity of suits. *Bryan* v. *Robert*, 1 Strobh. (S. C.) Eq. 334, 342. And see *McKeithen* v. *Butler*, 2 Rich. (S. C.) Eq. 37; *Long Dock Co.* v. *Mallery*, 1 Beas. (N. J.) Ch. 93.

A process to foreclose may be brought in Georgia. *Brown* v. *Greer*, 13 Ga. 285. So, foreclosure is a proper remedy for the enforcement of a chattel mortgage in Indiana. *Blakemore* v. *Taber*, 22 Ind. 466; *Brodhead* v. *McKay*, 46 id. 595. So in Iowa, and the proceedings to foreclose are properly cognizable in equity. *Packard* v. *Kingman*, 11 Iowa, 219. See, also, *Hall* v. *Bellows*, 11 N. J. Eq. 333. In Maryland, if no particular time is specified for the payment of a sum secured by

mortgage, it will be payable in a reasonable time; and if payment is not made within such time, the mortgagee may foreclose (*Farrell* v. *Bean*, 10 Md. 217); and before he has the right to foreclose, he is entitled, in case of apprehended danger or loss of the goods, to have a receiver appointed. *Rose* v. *Bevan*, 10 id. 466. In Illinois, a bill in equity may be maintained to foreclose a chattel mortgage where there are successive liens and incumbrances on the property, and various rights and interests to be adjusted, though, if the amount be small, and there are no adverse claims or other liens or mortgages, the remedy by notice and sale of the property is sufficient. *Dupuy* v. *Gibson*, 36 Ill. 197. In Louisiana, a *sequestration* of mortgaged personal property is allowed. *McFarlane* v. *Richardson*, 1 La. Ann. 12. But, to obtain it upon the ground that the property mortgaged is about to be removed from the State, the plaintiff must make oath both to his apprehension of such removal, and to the facts upon which it rests. *Bres* v. *Booth*, 1 id. 307

§ 3. **Who may foreclose.** The representative, and not the heir, of a mortgagee of personal property should file the bill to foreclose the mortgage. Thus, in an early Virginia case, it was held that the executors of a mortgagee of slaves were the proper parties to foreclose, and that, if there be no executor or administrator, the fact should be suggested, and the children of the mortgagee made parties. *Harrison* v. *Harrison*, 1 Call. (Va.) 419. And see *Call* v. *Scott*, 4 id. 402. So, the assignee of a mortgage is the proper person, and has full right, to commence the suit for foreclosure. *Wynn* v. *Ely*, 8 Fla. 232. And a mortgage to a surety for indemnity will inure to the benefit of the creditor, who can maintain a bill for foreclosure. *Troy* v. *Smith*, 33 Ala. 469.

§ 4. **Defendants in foreclosure.** A person to whom a mortgagor of personal property has sold and delivered the property is held to be a proper party defendant to an action to foreclose the mortgage. Being in possession as owner, it is necessary to join him in order to foreclose his equity of redemption, and to subject the property, in his hands, to sale. *Trittipo* v. *Edwards*, 35 Ind. 467. But the mortgagor of the holder of another mortgage on the same property is not a necessary party. *Gregory* v. *Cable*, 26 N. J. Eq. 178.

Where a bill is filed for the foreclosure of a mortgage of personal estate to which the mortgagor and a third person who has possession of the mortgaged property are parties, if the mortgagor admits the execution of the mortgage and the justness of the debt intended to be secured, the bill should not be dismissed, though the party in possession denies that he holds in subordination to the mortgagor, but asserts

an independent legal title. *Branch Bank at Mobile* v. *Taylor*, 10 Ala. 67.

A subsequent mortgagee of property, a part of which was embraced in a prior mortgage, may, after exhausting all his other securities without satisfaction, file a bill against the prior mortgagee, for the purpose of subjecting such property, by compelling him to resort, first, to the other property embraced in the mortgage. *Hannah* v. *Carrington*, 18 Ark. 85. See *Woodward* v. *Wilcox*, 27 Ind. 207.

In a suit against husband and wife, there may be a foreclosure against both, but not a joint judgment on the note. *Daniels* v. *Henderson*, 5 Fla. 452.

§ 5. **Relief granted.** The remedy of a mortgagee of chattels by foreclosure in equity, is more complete and effectual than at law. In equity, he is not only entitled to a foreclosure of the equity of redemption and a sale of the chattels, but the property will also be protected from conversion or destruction until a sale has been effected. See *Freeman* v. *Freeman*, 2 C. E. Green's (N. J.) Ch. 44. On the other hand, a sale of the chattels by the mortgagee himself, is, in the absence of statutory regulations, liable to be attended with difficulty and embarrassment; for the conduct and fairness of the sale, and the rights acquired under it, are always open to investigation at the instance of the mortgagor. Id. And see *Morris Canal, etc., Co.* v. *Lewis*, 1 Beas. (N. J.) 323; *ante*, 420, § 1.

A mortgagee of chattels has an implied irrevocable license, after foreclosure, to enter in a peaceable and reasonable manner upon the premises of the mortgagor to take away the mortgaged chattels, even if the mortgagor was but a tenant in common of the premises; at least, if the co-tenant has purchased, with notice of the mortgage, the mortgagor's interest in the mortgaged property. And if the premises are a dwelling-house, the door being open and no objection being made, the mortgagee has a right to enter and take the mortgaged property away, without previous notice. *McNeal* v. *Emerson*, 15 Gray, 384.

When a tenant, in order to secure the payment of rent, gives a mortgage upon personal property, it constitutes no ground for an injunction to restrain a foreclosure of the mortgage, that the premises were out of repair, and, therefore, no rent was due. *Davis* v. *Banks*, 2 Sweeny, 184.

Acceptance of payment of a mortgage of personal property by the mortgagee, after forfeiture, is a waiver of the forfeiture. *West* v. *Crary*, 47 N. Y. (2 Sick.) 423. And it is held that a mortgagee of personal property may, after foreclosure, by a distinct oral agreement made in the presence of the mortgagor with a third party, as, for

instance, the purchaser,—so waive or open the foreclosure, as to render himself liable in tort to such third party for a subsequent sale of the chattels to another. *Phelps* v. *Hendrick*, 105 Mass. 106.

TITLE IV.

FORECLOSURE OF PLEDGES.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Nature and definition. A familiar distinction made in the books between a pledge and a mortgage is, that in the case of a pledge, the title remains in the pledgor, and in the case of a mortgage, it passes to the mortgagee, subject to be divested. See *Brown* v. *Bement*, 8 Johns. 98; *Wood* v. *Dudley*, 8 Vt. 435; *Bonsey* v. *Amee*, 8 Pick. 236; 2 Story's Eq. Jur., § 1030. To constitute a pledge, there must be a delivery and retention by the pledgee of the thing pledged. *Thompson* v *Andrews*, 8 Jones (N. C.), 453; *First Nat. Bank of Macon* v. *Nelson*, 38 Ga. 391; *Foltier* v. *Schroder*, 19 La. Ann. 17; *Wolcott* v. *Keith*, 22 N. H. 196. And the lien created by a pledge can be maintained only by a continued possession of the property pledged. *Collins* v. *Buck*, 63 Me. 459; *Homes* v. *Crane*, 2 Pick. 610. And it may be extinguished by a tender of the amount due. *Haskins* v. *Kelly*, 1 Robt. (N. Y.) 160; S. C., 1 Abb. Pr. (N. S.) 63. If no time is fixed for the redemption of the pledge, the pledgor may redeem at any time; and the right of redemption survives on his death, to his legal representatives, against the pledgee and his representatives. *Perry* v. *Craig*, 3 Mo. 516; *Cortelyou* v. *Lansing*, 2 Caines' Cas. 200. But see *Chapman* v. *Turner*, 1 Call. (Va.), 280, 290. The pledgee may, after the debt becomes due, sell the pledge without resorting to judicial process; but in such case, unless there is an express waiver in the contract between pledgor and pledgee, the latter must give to the former notice of the time and place of the proposed sale, and also demand payment of the debt. *Parker* v. *Brancker*, 22 Pick. 40; *Mowry* v. *Wood*, 12 Wis. 413; *Alexandria, etc., R. R. Co.* v. *Burke*, 22 Gratt. (Va.) 254; *Gay* v. *Moss*, 34 Cal. 725; *Washburn* v. *Pond*, 2 Allen, 474; *Bryan* v. *Baldwin*, 52 N. Y. (7 Sick.) 233. And the notice to redeem by payment of the debt is held to be defective unless it allows a reasonable time for redemption. *Genet* v. *Howland*, 45 Barb. 560; S. C., 30 How. 360.

A bill may be filed in equity to redeem goods pledged for the payment of a debt. *Chapman* v. *Turner*, 1 Call. (Va.) 280; *Hart* v. *Ten Eyck*, 2 Johns. Ch. 100. But the remedy at law is simple, by tender of the amount due and a possessory action to recover the articles pledged, or damages for their detention. *Durant* v. *Einstein*, 5 Robt. (N. Y.) 423; S. C., 35 How. 240; *Flowers* v. *Sproule*, 2 A. K. Marsh. (Ky.) 56. And a court of equity has no general jurisdiction over actions to redeem personal property pawned, without some other circumstances rendering its interference necessary. *Jones* v. *Smith*, 2 Ves. 372; *Glennie* v. *Imri*, 3 Y. & Coll. 436. The only ground of equitable jurisdiction over such an action, besides the necessity of a discovery, and perhaps an assignment of the pledge, is held to be the necessity of taking an account. *Durant* v. *Einstein*, 5 Robt. (N. Y.) 423; S. C., 35 How. 223. And see *Demainbray* v. *Metcalfe*, 2 Vern. 698; *Kemp* v. *Westbrook*, 1 Ves. 278; 2 Story's Eq. Jur., § 1032.

§ 2 **Right to foreclose in equity.** It was the rule of the civil law, that a pledge could never be sold where there was no special agreement to the contrary, except under a judicial sentence, and the modern nations of continental Europe seem, generally, to have adopted this rule. See Story on Bailm., § 309. The like rule has been adopted in Louisiana. *Rasch* v. *His Creditors*, 1 La. Ann. 31. And the old English law, in the time of Glanville, seems to have required a judicial process to justify the sale, or at least to destroy the right of redemption. *Cortelyou* v. *Lansing*, 2 Caines' Cas. 200. But as the law stands at present, the pledgee may elect to sell the chattel pledged (see preceding section), or he may file a bill in equity against the pledgor for a foreclosure and sale. See *ante*, 410, title 1, art. 1, § 4; *Ogden* v. *Lathrop*, 1 Sweeney (N. Y.), 643. And the latter is the more advisable course in cases of pledges of large value, as the courts watch any other sale with uncommon jealousy and vigilance, and any irregularity may bring its validity into question. Story on Bailm., § 310. And see *Hart* v. *Ten Eyck*, 2 Johns. Ch. 62, 100. So, if the pledgor is absent, or cannot be found, judicial proceedings should be had, to bar his right of redemption. *Garlick* v. *James*, 12 Johns. 146. And see *Strong* v. *National Mechanics' Bank'g Assoc.*, 45 N. Y. (6 Hand) 718, 720.

§ 3. **Who may foreclose.** The pledgee cannot, at the common law, alienate the property pledged, absolutely, nor beyond the title actually possessed by him, except in special cases. *Hartop* v. *Hoare*, 3 Atk. 44; *Pickering* v. *Busk*, 15 East, 38. But he may deliver the goods into the hands of a stranger for safe custody without consideration. *Ingersoll* v. *VanBokkelin*, 7 How. 670. Or, he may sell and assign all his interest absolutely, or he may assign it conditionally by

way of pawn to another person; without, in either case, destroying the original lien, or giving to the owner a right to reclaim them on any other or better terms than he could have done before such delivery or assignment. *Jarvis* v. *Rogers*, 15 Mass. 389, 408; *Whitaker* v. *Sumner*, 20 Pick. 399; *Belden* v. *Perkins*, 78 Ill. 449. And if the thing pledged is capable in its own nature of passing by delivery, such as current coin, or a negotiable security, and the pledgee sells it to a *bona fide* purchaser without notice, the latter acquires an absolute property in the pledge. 1 Story's Eq. Jur., § 434; *Coit* v. *Humbert*, 5 Cal. 260. Thus, it has been decided that a pledge of a certificate of stock, which may pass by delivery, may be held by a *bona fide* purchaser, or subsequent pledgee, against the real owner. *Jarvis* v. *Rogers*, 13 Mass. 105; *Same* v. *Same*, 15 id. 389. See, also, *McNeil* v. *Tenth National Bank*, 46 N.Y. (1 Sick.) 325; S. C., 7 Am. Rep. 341; reversing S. C., 55 Barb. 59; *Moore* v. *Miller*, 6 Lans. (N. Y.) 396; *Driscoll* v. *West Bradley, etc., Co.*, 59 N. Y. (14 Sick.) 96. And the like rule is applicable to negotiable securities. *Depuy* v. *Clark*, 12 Ind. 432; *Garlick* v. *James*, 12 Johns. 146. But where a negotiable security contains on it any intimation that it belongs to another person, or that it is for his use or account, it is there held to be incapable of being pledged for the use of the holder. *Sigourney* v. *Lloyd*, 8 B. & C. 622; S. C., 5 Bing. 525; Story on Bailm., § 313. Thus, if a certificate of stock expressed in the name of "C B, trustee," is by him pledged to secure his own debt, the pledgee is, by the terms of the certificate, put upon inquiry as to the character and limitations of the trust, and if he accepts the pledge without inquiry, he does so at his peril. *Shaw* v. *Spencer*, 100 Mass. 382; S. C., 1 Am. Rep. 115. And see *Sturtevant* v. *Jaques*, 14 Allen, 523; *Walker* v. *Taylor*, 8 Jur. (N.S.) 681; S. C., 4 L. T. (N. S.) 845; *Thompson* v. *Toland*, 48 Cal. 99.

§ 4. **Defendants in foreclosure.** Where no time is fixed for payment, the pledgor has his whole life-time in which to redeem the pledge, unless called upon by the pledgee to redeem. And in case of the death of the pledgor without such a demand, his personal representatives may redeem. *Vanderzee* v. *Willis*, 3 Bro. Ch. 21; 2 Story's Eq. Jur., § 1032.

§ 5. **Relief granted.** The relief sought by a foreclosure in a court of equity is, to obtain payment of the debt by a sale of the pledge. And it is held that a bill will lie to obtain the sale of a pledge made to secure an unliquidated demand, without first proceeding at law to ascertain the damages. *Vaupell* v. *Woodward*, 2 Sandf. Ch. 143. Upon a foreclosure sale of the pledge, an absolute title passes to the

vendee. *Ex parte Mountfort*, 14 Ves. 606; 4 Kent's Com. 139; *Donohue* v. *Gamble*, 38 Cal. 340.

Where the pledgee of a chattel is deprived of possession by the pledgor, equity will compel a re-delivery of the chattel to the pledgee. *Coleman* v. *Shelton*, 2 McCord's (S. C.) Ch. 127.

TITLE V.

FORECLOSURE OF LIENS.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Nature and definition. See *ante*, 411, title 1, art. 2, § 5. A lien upon personal property, whether arising by operation of law, or from express contract, is a right of detaining the property of another until some claim is satisfied, and cannot exist without possession of the property in the person making the claim. *McCaffrey* v. *Wooden*, 62 Barb. 316. And see *Hammonds* v. *Barclay*, 2 East, 235; *Sumner* v. *Hamlet*, 12 Pick. 76; *Donald* v. *Hewitt*, 33 Ala. 534. The distinction between a lien and a pledge is said to be, that a mere lien cannot be enforced by sale by the act of the party, but that a pledge is a lien with a power of sale superadded. *Walter* v. *Smith*, 2 Barn. & Ald. 439; *McNeil* v. *Tenth National Bank*, 46 N. Y. (1 Sick.) 325; S. C., 7 Am. Rep. 341. The rule as generally stated is, that the right of lien is a personal right which cannot be parted with, and that a person who has a lien cannot sell his right to another, nor can he transfer the property over which the lien extends without losing his rights, unless the property has been pledged to secure the payment of money advanced, with an express or implied power of sale. *Ruggles* v. *Walker*, 34 Vt. 468; *Lickbarrow* v. *Mason*, 6 East, 27, note; *Jones* v. *Pearle*, 1 Strange, 557. The lien of a mechanic or manufacturer is neither a *jus ad rem*, nor a *jus in re*, but a simple right of retainer, personal to the party in whom it exists, and not assignable or attachable as personal property, or a chose in action of the person entitled to it. The lien in such cases is a mere passive lien or right of retainer; and, although the retention of the property may be attended with expense, and may be of no benefit to either party, these considerations will not change the nature of the lien or the rights conferred by it. *Lovett* v. *Brown*, 40 N. H. 511. And see *Doane* v. *Russell*, 3 Gray, 382; *Leg* v. *Evans*, 6 Mees. & W. 36; *Bozon* v.

Bolland, 4 Myl. & Cr. (18 Eng. Ch.) 354; *Cazenove* v. *Prevost*, 5 Barn. & Ald. 70; *Thames Ironworks Co.* v. *Patent Derrick Co.*, 1 Johns. & H. 93; S. C., 6 Jur. (N. S.) 1013; *Wing* v. *Griffin*, 1 E. D. Smith (N. Y.), 162. The principal benefit to be derived from a lien is in the way of protection against trespass or replevin in favor of the owner. *Coit* v. *Waples*, 1 Minn. 134. And see *Doane* v. *Russell*, 3 Gray, 384. As a consequence of the doctrine above stated, the lien can be enforced only by the party entitled, or by his express authority. *Jones* v. *Sinclair*, 2 N. H. 321. But it is held that the executor of a lien-holder may retain goods which were in the hands of his testator for the lien of the latter on them. *Gage* v. *Allison*, 1 Brev. (S. C.) 495.

As a party having a lien only, without a power of sale superadded by agreement, cannot lawfully sell the chattel for his reimbursement, carriers and others entitled to a lien are advised to obtain an express stipulation for power of sale in case the lien is not satisfied. 1 Chit. Gen. Pract. 495.

§ 2. **Right to foreclose in equity.** See *ante*, 411, title 1, art. 2, § 5. It is held that a court of equity has jurisdiction to enforce liens and pledges of personal property generally (*Black* v. *Brennan*, 5 Dana [Ky.], 310), upon the ground that there is no adequate remedy at law. 2 Kent's Com. 642; *Trust* v. *Pirsson*, 3 Abb. Pr. (N. Y.) 84; S. C. affirmed, 1 Hilt. 292. But see *Thames Ironworks Co.* v. *Patent Derrick Co.*, 2 Johns. & H. 93.

§ 3. **Parties to foreclosure.** To a bill filed for a foreclosure, it is a general rule that all the owners and parties interested should be made parties. *Case* v. *Woolley*, 6 Dana (Ky.), 18.

§ 5. **Relief granted.** In a suit for the foreclosure of a lien, the judgment of the court is a confirmation of the validity of the lien (*Annis* v. *Gilmore*, 47 Me. 152), and must be *in rem* against the property. *Thompson* v. *Gilmore*, 50 id. 428.

CHAPTER LXXII.

FRAUD.

ARTICLE I.

GENERAL RULES AND PRINCIPLES.

Section 1. Definition. So various are the forms in which fraud has appeared, it has been found very difficult to give it a precise definition. *Lehman* v. *Shackleford*, 50 Ala. 437. But nothing can be better settled than that fraud vitiates every contract, and it may consist either in misrepresentation, or in concealment. Thus, every misrepresentation, with regard to any thing which is a material inducement to a sale, which is made to deceive, and which actually does deceive the vendee, vitiates the contract of sale. So, also, every concealment of defects by artifice, and for the purpose of deceiving the buyer, is a fraud which vitiates the sale. *Wintz* v. *Morrison*, 17 Tex. 372; *Belden* v. *Henriques*, 8 Cal. 87; *Jones* v. *Emery*, 40 N. H. 348; *Grove* v. *Hodges*, 55 Penn. St. 504. And see *Lehman* v. *Shackleford*, 50 Ala. 437, 439; *Edmonson* v. *Meacham*, 50 Miss. 34.

Among the definitions of fraud given in the books are the following: The unlawful appropriation of another's property, with knowledge, by design, and without criminal intent. 1 Bouv. Dict. 612. By fraud is to be understood an intention to deceive, whether from an expectation of advantage to the party himself, or from ill-will toward another. Le Blanc, J., in *Haycraft* v. *Creasy*, 2 East, 92, 108. Fraud is a device, by means of which one party has taken an unconscientious advantage of the other. Jeremy's Eq. Jur. 358. Fraud in all cases implies a willful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to, either at law or in equity. *Green* v. *Nixon*, 23 Beav. 530, 535. Fraud is any act, sign, or language, which is resorted to or employed by one person to obtain an unfair and illegal advantage over another, whether the result be obtained by active misrepresentations, or by the illegal suppression of such facts, circumstances or truths as the law requires to be disclosed. 1 Wait's Law & Pract. 853; *Willink* v. *Vanderveer*, 1 Barb. 599, 607; *Whiteside* v. *Hyman*, 10 Hun, 218. By

the term "fraud," the *legal* intent and effect of the act complained of is meant. *Kirby* v. *Ingersoll*, 1 Harring. (Mich.) Ch. 172. *Actual* or *positive* fraud includes any cunning, deception, or artifice, used to circumvent, cheat, or deceive another. 1 Story's Eq. Jur., §§ 186, 187. But fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which any undue and unconscientious advantage is taken of another. Id. See, also, *Gale* v. *Gale*, 19 Barb. 249; *Dickinson* v. *Railroad Co.*, 7 W. Va. 390; *Kennedy* v. *Kennedy*, 2 Ala. 571; *Belcher* v. *Belcher*, 10 Yerg. (Tenn.) 121; *Story* v. *Norwich, etc., R. R. Co.*, 24 Conn. 94. So, it has been said that there is a very great distinction between fraud as regarded by a court of equity and fraud as regarded by a court of law. In order to constitute fraud at common law, it is not enough to show that fraud in the sense of misrepresentation and undue advantage of the position of the parties said to be imposed on has been committed, but the extent of the fraud must be brought home to the party to the action who is charged with it. In the case of fraud in the sense of a court of equity, a court of equity will take into account all the circumstances of the case,—not only the act and intention of the party, but the circumstances under which the act was done. *Stewart* v. *Great Western Railway Company*, 2 De G., J. & S. 319. See *Marksbury* v. *Taylor*, 10 Bush (Ky.), 519. And the following classification of frauds as a head of equity jurisdiction has been given: *First*, actual fraud, or *dolus malus*, arising from facts and circumstances of imposition; *second*, fraud arising from the intrinsic nature and subject of the bargain; *third*, fraud which may be presumed from the circumstances and condition of the parties contracting; *fourth*, fraud which may be collected and inferred from the matter and circumstances of the transaction as being an imposition and cheat on other persons, not parties to the transaction. Lord HARDWICKE, in *Chesterfield* v. *Janssen*, 2 Ves. Sr. 155.

Fraud has been placed in the class of injuries denominated injuries to property. Thus, it is said, that fraud is a wrong, and if a party thereby obtains, from another, property, it is an injury to the property of such other, in the same sense, precisely, as though the wrong-doer had taken the property tortiously and converted it. The law affords the injured party the same remedy in either case. In both cases it is property wrongfully obtained. *Cleveland* v. *Barrows*, 59 Barb. 364, 374.

Mere persuasion, unaccompanied by falsehood, undue concealment, or delusive promises, or by any violence, duress, or constraint, consti-

tutes neither fraud nor undue influence. *Bailey* v. *Litten*, 52 Ala. 282. A corporation may commit actionable frauds through the acts of its agents. *Scofield Rolling Mill Co.* v. *Georgia*, 54 Ga. 635.

§ 2. **Of concealment.** It is a well-established rule, that fraud may consist in the concealment of what is true as well as in the assertion of what is false, if the means of information are not equally accessible to both, but exclusively within the knowledge of one of the parties, and known to be material to a correct understanding of the subject. *Tapp* v. *Lee*, 3 B. & P. 367, 371; *Conyers* v. *Ennis*, 2 Mas. (C. C.) 236; *Getty* v. *Donelly*, 9 Hun, 603; *Clark* v. *Bamer*, 2 Lans. (N. Y.) 67; *Trigg* v. *Read*, 5 Humph. (Tenn.) 529; *Hough* v. *Richardson*, 3 Story, 659; *Printup* v. *Fort*, 40 Ga. 276; *Central Railway Company of Venezuela* v. *Kisch*, L. R., 2 H. L. Cas. 99; *Prentiss* v. *Russ*, 16 Me. 30; And especially, when one of the parties relies upon the other to communicate to him the true state of facts to enable him to judge of the expediency of the bargain. Id. A vendor who sells a bull which he is informed by the buyer is purchased to put with his cows; and where the vendor knows the bull to be useless for that purpose, but conceals his knowledge or does not disclose it, is guilty of a fraud and liable for the damages resulting to the buyer. *Maynard* v. *Maynard*, 49 Vt. 297; *Paul* v. *Hadley*, 23 Barb. 521. But where each party is possessed of the same information, or has an equal opportunity to ascertain the truth, it cannot be said that one willfully withholds any thing from, and thereby deceives the other. *Hobbs* v. *Parker*, 31 Me. 143; *Brown* v. *Leach*, 107 Mass. 364; *Rockafellow* v. *Baker*, 41 Penn. St. 319; *Dooly* v. *Jinnings*, 6 Mo. 61. And the concealment or non-disclosure of facts, sufficient to constitute a fraud, must be of those facts and circumstances which one party is under some legal or equitable obligation to disclose to the other, and which the other has a right to know, not merely *in foro conscientiæ* but *juris et de jure*. *Young* v. *Bumpass*, 1 Freem. (Miss.) Ch. 241; *VanArsdale* v. *Howard*, 5 Ala. 596; *McAdams* v. *Cates*, 24 Mo. 223; *Aortsen* v. *Ridgway*, 18 Ill. 23; *Kent* v. *Freehold Land and Brickmaking Company*, L. R., 4 Eq. 598. So, it is essential that the concealment should be in reference to a given occasion, and that it should inure to the date of the particular transaction (*Green* v. *Gosden*, 4 Scott, N. R. 13; S. C., 3 M. & G. 446); for, notwithstanding the concealment, if the party claiming to be injured thereby, procures a knowledge of the fact concealed before entering into the transaction, the concealment goes for nothing. *Pratt* v. *Philbrook*, 33 Me. 17; *Irvine* v. *Kirkpatrick*, 3 Eng. Law & Eq. 17, 37; *Vernol* v. *Vernol*, 63 N. Y. (18 Sick.) 45.

A person who knows of a mine upon the land of another, of which

the latter is ignorant, is not bound, in treating for the purchase of the land, to communicate his knowledge to the vendor. *Fox* v. *Mackreth*, 2 Bro. Ch. 420; *Harris* v. *Tyson*, 24 Penn. St. 347. But, if the vendee is interrogated as to his knowledge of a mine, and he then denies the knowledge of which he is possessed, this denial will make the transaction fraudulent. *Smith* v. *Beatty*, 2 Ired. (N. C.) Eq. 456. And, although a vendee is, in general, under no obligation to communicate information concerning extrinsic circumstances which might influence the price of a commodity where the means of intelligence are equally accessible to both parties, yet, at the same time, each party must take care not to say or do any thing tending to impose upon the other. *Laidlaw* v. *Organ*, 2 Wheat. 178. See, also, *Kintzing* v. *McElrath*, 5 Penn. St. 467; *Matthews* v. *Bliss*, 22 Pick. 48. A single word, or even a nod, or a wink, or a shake of the head, or a smile from the purchaser, intended to induce the vendor to believe the existence of a non-existing fact which might influence the price of the subject to be sold, is a fraud at law. So, *a fortiori*, would any contrivance on the part of the purchaser better informed than the vendor of the real value of the subject to be sold, to hurry the vendor into an agreement without giving him the opportunity of being fully informed of its real value, or time to deliberate and take advice respecting the conditions of the bargain. *Walters* v. *Morgan*, 3 DeG., F. & J. 718 So, on the other hand, if the vendor employs any artifice to conceal defects, for the purpose of throwing the buyer off his guard, there is fraud (*Edwards* v. *Wickwar*, L. R., 1 Eq. 68; *Dobell* v. *Stevens*, 3 B. & C. 623; S. C., 5 D. & R. 490; *Doggett* v. *Emerson*, 3 Story, 700, 732); as where one with full knowledge of certain defects in a log of mahogany, induced a party to purchase and pay for it, by turning it over so as to conceal the defects. *Udell* v. *Artherton*, 7 H. & N. 172.

If the maker of a check, payable instantly, has no funds at the time in the bank upon which it is drawn, it is, when unexplained, deemed a fraud. *True* v. *Thomas*, 16 Me. 36. So, the concealment of a donation to a person incapable of receiving, under the form of an onerous contract, is a fraud on the heir who may show it by parol evidence or otherwise. *Dupre* v. *Uzee*, 6 La. Ann. 280.

But, it has been held, that the mere fact that the vendee, at the time of the sale, is insolvent, and knows himself to be so, and does not communicate that circumstance to the vendor, who is in ignorance thereof and known to be ignorant by the vendee, does not render the sale fraudulent and void. *Powell* v. *Bradlee*, 9 Gill & J. (Md.) 220; *Nichols* v. *Pinner*, 18 N. Y. (4 Smith) 295. Yet, if the goods are purchased with a preconceived design not to pay, it will be a fraud.

Hennequin v. *Naylor*, 24 N. Y. (10 Smith) 139; *Devoe* v. *Brandt*, 53 N. Y. (8 Sick:) 462.

§ 3. **Of silence.** Mere reticence, as it respects a matter open to either party to exercise his judgment upon, does not amount to a legal fraud. But where a person by his silence produces a false impression upon the mind of another, there is a fraud. See *Nelthorpe* v. *Holgate*, 1 Coll. 204, 221; *Cornfoot* v. *Fowke*, 6 M. & W. 359, 381; *Carter* v. *Boehm*, 3 Burr. 1910. Thus, in an English case, a man bought a picture under a delusion as to the ownership of it, which delusion the agent of the vendor encouraged for the purpose of effecting a sale, and it was held that the contract might be avoided on the ground of fraud. *Hill* v. *Gray*, 1 Stark. 434. And see *Keates* v. *Cadogan*, 2 Eng. Law & Eq. 318; S. C., 10 C. B. 600.

So, if one who has a legal title, by his acts and conversation, induces another to purchase the premises under another title, and stands by and sees him take a deed and pay his money for it, it is a fraud *per se*. *Engle* v. *Burns*, 5 Call. (Va.) 463; *Gray* v. *Bartlett*, 20 Pick. 186; *Tomlin* v. *Den*, 4 Harr. (N. J.) 76. But a wife and child standing by without making claim to property which the husband and father offers for sale, will not thereby be affected in their rights. *Hunter* v. *Foster*, 4 Humph. (Tenn.) 211. And silence will postpone, only where silence was a fraud; and a fraudulent concealment of title cannot be imputed to one, who was ignorant that he had any title to conceal. *Robinson* v. *Justice*, 2 Penn. 19. See, also, *Devereux* v. *Burgwyn*, 5 Ired. (N. C.) Eq. 351; *Clabaugh* v. *Byerly*, 7 Gill (Md.), 354. So, it has been held, that silence as to a defect in title, where a party sells in fee with warranty, is no ground for relief in equity. *Hastings* v. *O'Donnell*, 40 Cal. 148.

Where a carrier by his contract limits his liability to a specified amount, if the value of the property is not stated by the shipper, and the goods are of greater value than the amount specified, silence alone, on the part of the shipper as to the real value, although there be no inquiry by the carrier and no artifice to deceive, is fraud in law which discharges the carrier from liability for ordinary negligence. *Magnin* v. *Dinsmore*, 62 N. Y. (17 Sick.) 35; S. C., 20 Am. Rep. 442.

§ 4. **Taking advantage of ignorance.** The rule that the law favors the diligent, rather than the indifferent and careless, should not be enforced for the protection of those who avail themselves of the ignorance existing in the community, to perpetrate fraud upon its members. It has, therefore, been held, that if a note be transferred by delivery to a person who cannot read writing, with the representation that the indorser is liable, whereas the indorsement is

without recourse, this is a deceit for which an action will lie. *Decker* v. *Hardin*, 2 South. (N. J.) L. 579. So, where the agent of an insurance company, by false representations, induced an applicant for an unconditional policy of insurance, who was an illiterate person, to accept a policy which contained a condition that the liability of the company should depend upon the prompt payment of assessments upon a certain premium note, the transaction was deemed fraudulent. *Keller* v. *Equitable Fire Ins. Co.*, 28 Ind. 170. So, if a patentee knowingly includes in his patent the invention of another person previously patented, and sells the whole to a person ingorant of these facts, and who thought he was buying an exclusive right to the whole, the sale is a fraud upon the latter, and the vendor cannot recover upon a note given for the purchase. *Turner* v. *Johnson*, 2 Cranch (C. C.), 287. And where the defendant, in payment of a horse, delivered bank bills to the plaintiff, which were known by him to be worthless at the time, and unknown by the plaintiff, with an agreement that, if the notes were not returned in a given time, the defendant should not be bound to receive them, the transaction was held to be a fraud; and it was further held, that the plaintiff had a right to recover the value of the horse, though he did not return the notes within the time limited. *Smith* v. *Click*, 4 Humph. (Tenn.) 186. Likewise, if a party pays money in ignorance of circumstances with which the receiver is acquainted and does not disclose, and which, if disclosed, would have avoided the payment, the receiver acts fraudulently, and the money may be recovered back. *Martin* v. *Morgan*, 3 Moore, 635; S. C., 1 B. & B. 289; Gow. See, also, *Hall* v. *Purnell*, 2 Md. Ch. 137; *Blake* v. *Mowatt*, 21 Beav. 614; *Nevitt* v. *Bank of Port Gibson*, 1 Freem. (Miss.) Ch. 438.

§ 5. **Falsity of statements.** The class of cases in which courts of justice are most frequently called upon to give relief against fraud is, where there has been a misrepresentation, or *suggestio falsi.* See *Jarvis* v. *Duke*, 1 Vern. 20; *Evans* v. *Bicknell*, 6 Ves. 173. But, to justify the interposition of a court, the false statements must be made in respect to matters of fact, and not of law. *Starr* v. *Bennett*, 5 Hill (N. Y.), 303; *Fish* v. *Cleland*, 33 Ill. 238; *Reed* v. *Sidener*, 32 Ind. 373; *Rashdall* v. *Ford*, L. R., 2 Eq. 750; *Beattie* v. *Ebury*, 41 L. J. Ch. 804; S. C., 20 W. R. 994. In general, a misrepresentation as to a matter of law is not a fraud, in the absence of special circumstances, or peculiar relations of trust and confidence between the parties. *Lehman* v. *Shackleford*, 50 Ala. 437. And see *Townsend* v. *Cowles*, 31 id. 428.

Nor will false statements be deemed fraudulent, unless they be made

in respect of an ascertainable fact, as distinguished from a mere matter of opinion. *Davis* v. *Meeker*, 5 Johns. 354; *Maney* v. *Porter*, 3 Humph. (Tenn.) 347. Conjectural statements, or those which are vague and indefinite in their nature and terms, though untrue, go for nothing, since a man is not justified in placing reliance upon them. *Jennings* v. *Broughton*, 5 De G., M. & G. 134; *Drysdale* v. *Mace*, id. 107; *Payne* v. *Smith*, 20 Ga. 654. Mere exaggeration is a totally different thing from misrepresentation of a precise or definite fact. *Ross* v. *Estates Investment Co.*, L. R., 3 Eq. 122, 136. Thus, no prudent person can, because of the well-known prevalence of exaggeration in the prospectuses of companies, accept the prospects held out by the originators of every new scheme, without considerable abatement. Id. Yet, even in a prospectus, the representations must be fair, honest, and *bona fide*, and mis-statements of any material facts and circumstances will be deemed fraudulent. Id.; *Denton* v. *MacNeil*, 2 id. 352; *Smith* v. *Reese River Co.*, id. 264; *Kisch* v. *Central Railway Company of Venezuela*, 3 De G., J. & S. 122; *Ship* v. *Crosskill*, L. R., 10 Eq. 73; *Henderson* v. *Lacon*, 5 id. 257. And see *Briggs* v. *Vick*, 65 N. Y. (20 Sick.) 569. General assertions made by a vendor as to the value of property he offers for sale, or as to the price he has been offered for it, or in regard to its qualities and characteristics, though erroneous or false, will not, except in extreme cases, be regarded as evidence of a fraudulent intent. One who relies upon such assertions, made by a person whose interest so readily prompts him to invest the property with exaggerated value, does so at his peril, and must take the consequences of his own imprudence. *Manning* v. *Albee*, 11 Allen, 520, 522; *Curry* v. *Keyser*, 30 Ind. 214; *Ellis* v. *Andrews*, 56 N. Y. (11 Sick.) 83; 15 Am. Rep. 379; *Dimmock* v. *Hallett*, L. R., 2 Ch. App. 26; *Allen* v. *Hart*, 72 Ill. 104; *Anderson* v. *Hill*, 2 Sm. & M. (Miss.) 679. False statements as to the quality or condition of land will, however, in extreme cases, amount to a misrepresentation in law. *Van Epps* v. *Harrison*, 5 Hill (N. Y.), 63; *Dimmock* v. *Hallett*, L. R., 2 Ch. App. 26. So, a statement of value may be so manifestly false, as to render it impossible for the party making it, to have believed what he stated. See *Wall* v. *Stubbs*, 1 Madd. 80; *Pitts* v. *Cottingham*, 9 Port. (Ala.) 675; *Medbury* v. *Watson*, 6 Metc. (Mass.) 259. A false representation as to the quantity of salt-petre certain land would yield, was held fraudulent. *Perkins* v. *Rice*, 6 Litt. (Ky.) 218. So, if a person sells land, claiming to be the owner thereof, and knowing that he is not, he is guilty of a fraud. But if he professes to sell, not the paramount title, but only a claim derived from a particular source, as from a sale of the land for taxes, he is not guilty of a fraud merely

because he expresses an opinion as to the legal value or strength of his claim, which the facts do not justify, so long as he makes no false statement as to what those facts are. *Drake* v. *Latham*, 50 Ill. 270. So, representations as to the number of acres within boundaries which are pointed out (*Gordon* v. *Parmelee*, 2 Allen, 212), or, as to the price paid for land (*Hemmer* v. *Cooper*, 8 Allen, 334), or, as to the quantity of wood and hay that could be cut from a certain lot (*Mooney* v. *Miller*, 102 Mass. 217), though false, are not actionable. Id. Such representations are to be regarded as the usual and ordinary means adopted by sellers to obtain a high price, and are always understood as affording to buyers no ground for omitting to make inquiries. Id. And see *Holbrook* v. *Connor*, 60 Me. 578; 11 Am. Rep. 212; *Cooper* v. *Lovering*, 106 Mass. 79; *Morrison* v. *Koch*, 32 Wis. 254. But a false affirmation by a vendor to a purchaser of a farm covered with snow, as to the quantity of hay cut thereon the previous season, was held to be actionable. *Martin* v. *Jordon*, 60 Me. 531. So, a representation that land is situated on the banks of a river, whereas it is some miles off from the river, is actionable. *Van Epps* v. *Harrison*, 5 Hill (N. Y.), 67. And so of a representation, by which the person to whom it is made is led to believe that there is a natural supply of water upon the land, whereas the fact is, that the land, though well watered, derives its supply artificially from the water-works of a town, and by payment of rates. *Leyland* v. *Illingworth*, 2 De G., F. & J. 253. And see *Monell* v. *Colden*, 13 Johns. 395.

§ 6. **Knowledge as to statements.** It has been laid down as settled law, that, if a party makes representations in such a manner as to import a knowledge in him of facts, whilst in fact he has no knowledge of the facts, and the representations are made with the intent that another shall rely on them, and that other does rely on them, and those representations turn out to be false, it is as much a fraud as if the party making them knew them to be untrue. *Bennett* v. *Judson*, 21 N. Y. (7 Smith) 238; *Sharp* v. *Mayor, etc., of New York*, 40 Barb. 256; *Indianapolis, Peru and Chicago Railway Co.* v. *Tyng*, 63 N.Y. (18 Sick.) 653; *Twitchell* v. *Bridge*, 42 Vt. 68; *Bankhead* v. *Alloway*, 6 Cold. (Tenn.) 56; *Smith* v. *Richards*, 13 Pet. 26; *Thompson* v. *Lee*, 31 Ala. 292; *Kennedy* v. *Panama, etc., Co.*, L. R., 2 Q. B. 580; *Graves* v. *Lebanon National Bank*, 10 Bush (Ky.), 23; 19 Am. Rep. 50. And it is held, that even if a party innocently misrepresents a material fact by mistake, it is equally conclusive, for it operates as a surprise and imposition upon the other party. See Id.; *Wilcox* v. *Iowa Wesleyan University*, 31 Iowa, 367; *Carpenter* v. *American Insurance Co.*, 1 Story, 57; *Bankhead* v. *Alloway*, 6 Cold. (Tenn.) 56; *Tay-*

mon v. *Mitchell*, 1 Md. Ch. Dec. 496. The representation must, however, have been deliberately made. And representations of a fugitive sort uttered casually in a mixed conversation, from impulse rather than reflection, should be cautiously received when they are to be made the basis of liability. *Casey* v. *Allen*, 1 A. K. Marsh. (Ky.) 465. See, also, *Hutton* v. *Rossiter*, 7 De G. M. & G. 23; *Rawlins* v. *Wickham*, 3 De G. & J. 304. So, if a party to a transaction, in making a false representation, is honestly mistaken, there is no ingredient of fraud in the case, whatever the effect may be as to giving the party deceived a right to rescind. *Hammond* v. *Pennock*, 61 N. Y. (16 Sick.) 145; *Dudley* v. *Scranton*, 57 N. Y. (12 Sick.) 424; *Hartford Insurance Co.* v. *Matthews*, 102 Mass. 221; *Wheeler* v. *Randall*, 48 Ill. 182; *Griswold* v. *Sabin*, 52 N. H. 267; S. C., 12 Am. Rep. 76; See, also, *Brooks* v. *Hamilton*, 15 Minn. 26. And in some of the cases the true rule is stated to be, that to constitute fraud it is not only necessary that the representation should be false, but also that the party making it should know it to be so, or have reason to believe it to be so, at the time it was made. *Campbell* v. *Hillman*, 15 B. Monr. (Ky.) 508; *McDonald* v. *Trafton*, 25 Me. 225; *Furman* v. *Titus*, 8 J. & Sp. (N. Y.) 284; *Byard* v. *Holmes*, 34 N. J. Law, 296; *Stitt* v. *Little*, 63 N. Y. (18 Sick.) 427.

But, although the false representation may in the first instance have been the result of innocent error, yet, if after discovering the falsity of the representation, the party making it suffers the other party to continue in error and to act on the belief that no mistake has been made, this, from the time of the discovery, becomes a fraudulent misrepresentation, even though it was not so originally. *Reynell* v. *Sprye*, 1 De G., M. & G. 660, 709. So, if a party makes a representation, thereby inducing another to adopt a particular course, and the circumstances are afterward altered to the knowledge of the party who made the representation, but not to the knowledge of the other, and are so altered that the alteration may affect the course of conduct which may be pursued by the latter, it is the duty of the party who has made the representation to communicate to the party to whom he made it, the alteration of the circumstances. And if he fail to make such communication, the latter will not be bound in equity. *Trail* v. *Baring*, 4 Giff. 485; S. C. affirmed, 10 Jur. (N. S.) 377. And a misrepresentation, although innocently made, and with an honest belief in its truth, is deemed a fraud at law, if it be made by one who ought in the due discharge of his duty to have known the truth, or who formerly knew, and ought to have remembered the fact which negatives the representation. *Moens* v. *Heyworth*, 10 M. & W. 147; *Swan* v.

North British Australian Co., 2 H. & C. 183; *Ayre's Case*, 25 Beav. 522. If the representation proves to be untrue, the party making it is not excused by averring that he believed it to be true, and made the misstatement through mistake, or ignorance, or forgetfulness. Id.; *Rawlins* v. *Wickham*, 3 De G. & J. 304; *Hutton* v. *Rossiter*, 7 De G., M. & G. 9; *Henderson* v. *Lacon*, L. R., 5 Eq. 262; *Bacon* v. *Bronson*, 7 Johns. Ch. 194. A person may render himself liable to an action for fraud, by stating his mere belief as *knowledge*. Thus, if the vendor of land has only an opinion or belief as to the quantity contained in the tract he offers for sale, to pass off such belief upon the purchaser as *knowledge*, is an imposition, and is actionable if the quantity is overstated. *Cabot* v. *Christie*, 42 Vt. 121; 1 Am. Rep. 313. And this is so, if he makes an absolute representation which is intended and understood as a statement upon knowledge, although he does not in terms profess to have knowledge. Id.; *Stone* v. *Covell*, 29 Mich. 359; *Litchfield* v. *Hutchinson*, 117 Mass. 195. See the preceding section.

The fact that the false representations were made, not upon the party's own personal knowledge, but upon information from others, is held to be no defense to an action for the deceit. *Fisher* v. *Millen*, 103 Mass. 503. See *Henderson* v. *Lacon*, L. R., 5 Eq. 261; *Ross* v. *Estates Investment Company*, L. R., 3 Eq. 138. But if a man be inquired of as to the fortune or circumstances of another, statements appearing in wills, deeds, marriage settlements, etc., are reasonable sources of information, and he cannot be called on if the statements therein appearing turn out to be incorrect, to make good his representation. *Evans* v. *Wyatt*, 31 Beav. 217; *Ainslie* v. *Medlycott*, 9 Ves. 21.

A person making a false statement, not knowing its falsity, but being in possession of facts sufficient to put him upon inquiry, is liable for the consequences, to the same extent as if he had actual knowledge. 3 Keyes, 387; S. C., 3 Abb. (N. S.) 235; 1 Abb. Ct. App. 454. See *Chamberlin* v. *Prior*, id. 338; S. C., 2 Keyes, 539. And one who uses words in a deceptive and double sense, for the purpose of deceit, is bound by them in the sense in which he used them. *Johnson* v. *Hathorn*, 3 Keyes, 126; S. C., 2 Abb. Ct. App. 465; Vol. 1, 124.

§ 7. **Intent in making statements.** A false representation does not amount to a fraud at law, unless it be made with a fraudulent intent. The intent to deceive is a necessary element or ingredient of fraud. *Weed* v. *Case*, 55 Barb. 534; *Griswold* v. *Sabin*, 51 N. H. 167; S. C., 12 Am. Rep. 76; *Marsh* v. *Falker*, 40 N. Y. (1 Hand) 562; *Stitt* v. *Little*, 63 N. Y. (18 Sick.) 427. But the legal definition of fraud does not include necessarily any degree of moral turpitude. See

Moens v. *Heyworth*, 10 M. & W. 517; *Wilde* v. *Gibson*, 1 H. L. Cas. 633. If a man says what is false within his knowledge, or what he has no reasonable ground for believing to be true, and makes the representation with the view to induce another to act upon it, who does so accordingly to his prejudice, the law imputes to him a fraudulent intent, although he may not have been in fact instigated by a morally bad motive. An intention to deceive, or a fraudulent intent in the legal acceptation of the term, depends upon the knowledge or belief respecting the falsehood of the statement, and not upon the actual dishonesty of purpose in making the statement. Id.; *Polhill* v. *Walter*, 3 B. & Ad. 114; *Foster* v. *Charles*, 7 Bing. 107; *Collins* v. *Denison*, 12 Metc. (Mass.) 549. And see *Peter* v. *Wright*, 6 Ind. 186; *Brady* v. *Barnes*, 42 Conn. 512. If one honestly makes a representation believing it to be true, and there be reasonable ground for such belief, a fraudulent intent will not be imputed to him, though it may turn out false, unless the representation be made in a case where he was under an obligation to know the truth. *Thom* v. *Bigland*, 8 Exch. 726; *Collins* v. *Evans*, 5 Q. B. 820.

§ 8. **Materiality of statements.** All the authorities are uniform in holding, that in order to sustain an allegation of fraud by false representation, the representation must be of some matter or thing material to the contract or transaction sought to be avoided because of it. *Jennings* v. *Broughton*, 5 De G., M. & G. 126; *Donelson* v. *Clements*. Meigs (Tenn.), 155; *Cunningham* v. *Smith*, 10 Gratt. (Va.) 255; *Gillet* v. *Phelps*, 12 Wis. 392. It must relate distinctly and directly to the contract, and affect its very essence and substance (*Taylor* v. *Fleet*, 1 Barb. 471; *Elder* v. *Allison*, 45 Ga. 13; *Frenzel* v. *Miller*, 37 Ind. 3; 10 Am. Rep. 62; *Green* v. *Gosden*, 4 Scott N. R. 13; S. C,. 2 M. & G. 446; *Goldicutt* v. *Townsend*, 28 Beav. 445; *Denne* v. *Light*, 8 De G. M. & G. 774; *New Brunswick, etc., Railway Co.* v. *Conybeare*, 9 H. L. Cas. 711; *Masterson* v. *Beers*, 1 Sweeney [N. Y.], 406; *Byard* v. *Holmes*, 34 N. J. Law, 296), being the material inducement or motive to the act or omission of the other party, and by which he is actually misled to his injury. *Hill* v. *Bush*, 19 Ark. 522; *Hazard* v. *Irwin*, 18 Pick. 95; *Cornfoot* v. *Fowke*, 6 M. & W. 378; *Pulsford* v. *Richards*, 17 Beav. 87; *Clark* v. *Everhart*, 63 Penn. St. 347; *Morgan* v. *Snapp*, 7 Ind. 537; *Clarke* v. *Dickson*, 6 Q. B. (N. S.) 453. Misrepresentations which, if true, tend to add substantially to the value of property, or to increase substantially its apparent value, are material. *Price* v. *Macaulay*, 3 De G., M. & G. 344; *Dimmock* v. *Hallett*, L. R., 3 Ch. App. 27. Thus, if a person should sell an estate to another, falsely representing that it contained a valuable mine,

which constituted an inducement to the other side to purchase—the contract for the sale, and the sale itself, if completed, might be avoided for fraud; for the representation would go to the essence of the contract. 1 Story's Eq. Jur., § 195; *Lowndes* v. *Lane*, 2 Cox, 361. So, of a false representation as to the location of an estate. *Beet* v. *Snow*, 2 Sandf. Ch. 298. And so, where one wishing to sell a public house falsely represented that the monthly receipts amounted to such a sum. *Philmore* v. *Hood*, 6 Scott, 827. So, a misrepresentation as the capacity of a mill was held to be material. *Sieveking* v. *Litzler*, 31 Ind. 13. A false statement by the vendor that he has examined the title and found it good, will avoid the sale, if the statement be relied upon by the vendee. *Babcock* v. *Case*, 61 Penn. St. 427. And a false representation of solvency has been held to be good ground for rescission. *Foxworth* v. *Bullock*, 44 Miss. 457. But a spring of water represented to be upon the land purchased, which, from its location and value, could not have formed a leading inducement to the purchaser, being found to be without the purchase, will not authorize a rescission. *Winston* v. *Gwathmey's Heirs*, 8 B. Monr. (Ky.) 19.

In the absence of a positive standard by which to determine whether the fraud connected with a transaction is material and amounts to cognizable fraud so as to render the person guilty of it liable to the person injured, the following rule has been given for deciding the question: If the fraud be such that, had it not been practiced, the contract could not have been made or the transaction completed, then it is material; but if it be shown or made probable that the same thing would have been done in the same way, if the fraud had not been practiced, it cannot be deemed material. *McAleer* v. *Horsey*, 35 Md. 439.

Where a creditor is induced to compromise a debt upon the receipt of fifty cents on the dollar, by means of false and fraudulent representations made to him by the debtor, that another of his creditors has agreed to accept such compromise, the creditor may, upon discovering the falsity of such representation, maintain an action against the debtor to recover the damages sustained by reason thereof. *Whiteside* v. *Hyman*, 10 Hun, 218.

§ 9. **Belief in statements, or acting upon them.** To constitute a fraud by false representation such as will entitle the complaining party to relief, the misrepresentation must not only be in something material, but the complainant must have believed the false statement to be true, and relied upon it, and have been deceived thereby. *Stitt* v. *Little*, 63 N. Y. (18 Sick.) 427; *Masterton* v. *Beers*, 1 Sweeney (N. Y.), 406; *Byard* v. *Holms*, 34 N. J. Law, 296; *Laidlaw* v.

Organ, 2 Wheat. 178; *Frenzel* v. *Miller*, 37 Ind. 1. Thus, where a seller of goods knowingly makes false representations to the buyer as to their quality, but the buyer does not rely upon such representations and is not deceived thereby,—as where the buyer, in making the purchase, relies on a test of their quality made by his own agent, who is not prevented by any act or word of the seller from testing the goods, —the seller is not liable for deceit. *Hagee* v. *Grossman*, 31 Ind. 223. See, also, *Attwood* v. *Small*, 6 Cl. & Fin. 232; *Jennings* v. *Broughton*, 5 De G., M. & G. 126; S. C., 17 Beav. 234. So, in general, if the party to whom the representations were made, himself resorted to the proper means of verification before entering into the contract, it may appear that he relied on the results of his own investigation and inquiry, and not upon the representations made to him by the other party (*Clapham* v. *Shillets*, 7 Beav. 149. See *Mason* v. *Crosby*, 1 Wood. & M. 342; *Hough* v. *Richardson*, 3 Story, 691); or, if the means of investigation and verification be at hand, and the attention of the party receiving the representation be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representation made to him may be excluded. Id.; *Perkins* v. *Rice*, 6 Litt. (Ky.) 218; *Johnson* v. *Taber*, 10 N. Y. (6 Seld.) 319; *Gordon* v. *Parmelee*, 2 Allen, 214. If the fact is one of which every man is equally capable of judging for himself, there is no misrepresentation. *Mississippi Union Bank* v. *Wilkinson*, 3 Sm. & M. (Miss.) 78. See, also, *White* v. *Seaver*, 25 Barb. 235; *Bell* v. *Byerson*, 11 Iowa, 233; *Fulton* v. *Hood*, 34 Penn. St. 365; *Matlock* v. *Todd*, 19 Ind. 130. A party who can read, but who signs a written instrument without reading it, and afterward sets up as a defense to an action upon it, that he was induced to sign it through the fraud of the plaintiff's agent as to the contents of the instrument, will be held to abide by his own folly, and will be bound by his signature. *Maine, etc., Ins. Co.* v. *Hodgkins*, 66 Me. 109. See *Harris* v. *Story*, 2 E. D. Smith, 364, and Vol. 1, 566, and cases there cited. And fraud cannot, of course, be held to have been perpetrated by misrepresentations, when the party who claims to have been defrauded believed the opposite of what was represented. *Bowman* v. *Carithers*, 40 Ind. 90; *Stitt* v. *Little*, 63 N. Y. (18 Sick.) 427.

If, however, the misrepresentation renders the examination less thorough, or makes the statements of the party to be in part confided in, as in respect to details, extending personal inquiry only to general matters and general appearances, the fraud vitiates the whole contract.

Smith v. *Babcock*, 2 Wood. & Min. 246; *Chamberlain* v. *Rankin*, 49 Vt. 133. So, it is laid down as a principle, that wherever a sale is made of property not present, but at a remote distance, which the seller knows the purchaser has never seen, but which he buys upon the representation of the seller, relying on its truth, then the representation, in effect, amounts to a *warranty;* at least, that the seller is bound to make good the representation. *Smith* v. *Richards*, 13 Pet. 26, 42; *Bean* v. *Herrick*, 12 Me. 262; *Babcock* v. *Case*, 62 Penn. St. 427; *Miner* v. *Medbury*, 6 Wis. 295; *Hill* v. *Brower*, 76 N. C. 124. And see *Re Reese River Silver Mining Co.*, L. R., 2 Ch. App. Cas. 614.

§ 10. **Must cause damage or injury.** Fraud and damage coupled together will entitle the injured party to relief in any court of justice. *Bacon* v. *Bronson*, 7 Johns. Ch. 201; *Turnbull* v. *Gadsden*, 2 Strobh. (S. C.) Eq. 14. But fraud without damage is not sufficient to support an action, nor is it ground for relief in equity. *Polhill* v. *Walter*, 3 B. & Ad. 114; *Nye* v. *Merriam*, 35 Vt. 438; *Freeman* v. *McDaniel*, 23 Ga. 354; *Byard* v. *Holmes*, 34 N. J. Law, 296; *Masterton* v. *Beers*, 1 Sweeny (N. Y.), 406; *Sellar* v. *Clelland*, 2 Col. T. 532. Fraud can never, in judicial proceedings, be predicated of a mere emotion of the mind, disconnected from an act occasioning an injury to some one. A fraudulent transaction implies a wrong done, as well as a person wronged. *People* v. *Cook*, 8 N. Y. (4 Seld.) 67. And not only must there be some sort of damage to give a cause of action, but the representation must be the immediate and not the remote cause of the damage. *Barry* v. *Crosskey*, 2 Johns. & H. 1. It is enough, however, if the representation operates to the prejudice of a man to a very, small extent. *Cadman* v. *Horner*, 18 Ves. 10. And see *Smith* v. *Kay* 7 H. L. Cas. 750, 775.

§ 11. **Presumptions as to fraud.** In addition to that species of fraud which consists in misrepresentations, express or implied, there is also another kind of fraud, which will be presumed from the inequality of the footing of the parties. Thus, upon the ground of want of rational and deliberate consent, the contracts of idiots, lunatics, and other persons *non compos mentis*, are generally deemed invalid by a court of equity. See *Elliott* v. *Ince*, 7 DeG., M. & G. 475; *Manning* v. *Gill*, L. R., 13 Eq. 485; *Jacobs* v. *Richards*, 18 Beav. 300; *Niell* v. *Morley*, 9 Ves. 478; *Hadley* v. *Latimer*, 3 Yerg. (Tenn.) 537; *Conant* v. *Jackson*, 16 Vt. 335. And a conveyance may be impeached for a mere weakness of intellect, provided it be coupled with other circumstances to show that the weaknsss, such as it is, has been taken advantage of by the other party; but the mere fact that a man is of weak un-

derstanding or is in intellectual capacity below the average of mankind, if there be no fraud, or no undue advantage be taken, is not of itself an adequate ground to set aside a transaction. *Blachford* v. *Christian*, 1 Knapp, 73; *Ball* v. *Mannin*, 3 Bligh (N. S.), 1; Kerr on Fraud, 146; *Young* v. *Stevens*, 48 N.H. 133, 2 Am. Rep. 202; *Davis* v. *McNalley*, 5 Sneed (Tenn.), 583. Nor will a court of equity impute fraud merely because one party is more intelligent than the other, although the bargain may turn out to be more advantageous to the wiser party. *Mann* v. *Betterly*, 21 Vt. 326; *Aiman* v. *Stout*, 42 Penn. St. 114; *Beverley* v. *Walden*, 20 Gratt. (Va.) 147; *Cain* v. *Warford*, 33 Md. 23; *Farnam* v. *Brooks*, 9 Pick. 212. And if a man be drunk, but not to the extent of complete intoxication, he cannot be relieved from a transaction entered into by him while in that state, unless it appear that he was drawn into drink by the contrivance of the other party, and that an unfair advantage was taken of his situation. *Taylor* v. *Patrick*, 1 Bibb (Ky.), 168; *Cook* v. *Clayworth*, 18 Ves. 12; *Reinicker* v. *Smith*, 2 Harr. & J. (Md.) 421; *Dunn* v. *Amos*, 14 Wis. 106; *Belcher* v. *Belcher*, 10 Yerg. (Tenn.) 121.

An infant is not, either at law or in equity, bound by his contract after his majority on the single ground that, without any false assertion on his part, the other party believed him to be of age. *Stikeman* v. *Dawson*, 1 DeG. & Sm. 105. But an infant will not be permitted by a court of equity to take advantage of his own fraud (*Clark* v. *Cobley*, 1 Cox, 173; *Arnot* v. *Biscoe*, 1 Ves. 95; *Beckett* v. *Cordley*, 1 Bro. C. C. 358); and where an infant by a false and fraudulent representation that he is of full age, induces a man to enter into a contract with him, the infant is bound in equity (*Ex parte Taylor*, 8 DeG., M. & G. 254; *Hannuh* v. *Hodgson*, 30 Beav. 23; *Wright* v. *Snowe*, 2 DeG. & Sm. 321), although he may not be held liable at law. *Bartlett* v. *Wells*, 1 B. & S. 836; *Liverpool Adelphi Association* v. *Fairhurst*, 9 Exch. 422; *Burley* v. *Russell*, 10 N. H. 184; *Stoolfoos* v. *Jenkins*, 12 Serg. & R. 399; *Brown* v. *McCune*, 5 Sandf. (N. Y.) 224. But, that he is also liable at law, see *Wallace* v. *Morss*, 5 Hill (N. Y.), 391; *Eckstein* v. *Frank*, 1 Daly, 334; *Schunemann* v. *Paradise*, 46 How. 426; *Towne* v. *Wiley*, 23 Vt. 355, 361; *Hewitt* v. *Warren*, 10 Hun, 560. But not where the substantive ground of the action is contract, or where the contract is stated as inducement to the alleged tort. *Hewitt* v. *Warren*, 10 Hun, 560; *Doran* v. *Smith*, 49 Vt. 353. *Coverture* is no excuse in equity for a fraud. *Evans* v. *Bicknell*, 6 Ves. 174, 181. And see *Hobday* v. *Peters*, 28 Beav. 354; *Sharpe* v. *Foy*, L. R., 4 Ch. App. 35; *Sexton* v. *Wheaton*, 8 Wheat. 229; *Bein* v. *Heath*, 6 How. (Miss.) 238; *Curd* v. *Dodds*, 6 Bush (Ky.),

681. But the acquiescence of a married woman in a transaction will not bind her, if the person with whom the transaction was entered into knew that she was married. *Nicholl* v. *Jones*, 36 L. J. Ch. 554. And see *Wilks* v. *Fitzpatrick*, 1 Humph. (Tenn.) 54; *Bank of United States* v. *Lee*, 13 Pet. 107; *Drake* v. *Glover*, 30 Ala. 382; *Gatling* v. *Rodman*, 6 Ind. 289; *Glidden* v. *Strupler*, 52 Penn. St. 400. Nor can she be precluded from relying on her coverture as a bar to legal liability for a fraud committed by her in a contract which her disability made void. *Owens* v. *Snodgrass*, 6 Dana (Ky.), 229; *Curd* v. *Dodds*, 6 Bush (Ky.), 681; *Keen* v. *Coleman*, 39 Penn. St. 299; *Lowell* v. *Daniels*, 2 Gray, 161. It may, however, be observed in general, that neither *infancy* nor *coverture* can excuse parties guilty of fraudulent concealment or misrepresentation, for neither infants nor *femes covert* are privileged to practice frauds upon innocent persons. 1 Story's Eq. Jur., § 385; *Davis* v. *Tingle*, 8 B. Monr. (Ky.) 542. Thus, it has been held, that a deed made by an infant *feme covert* cannot be bavoided by her on the ground of her infancy, when, to induce an innocent purchaser to make the purchase, she and her husband made oath before a notary that to the best of their knowledge and information she was then more than twenty-one years of age. *Schmitheimer* v. *Eiseman*, 7 Bush (Ky.), 298.

But the most comprehensive class of cases of undue concealment arises where the relation between the parties is one of a fiduciary nature; such as the relation of client and attorney, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, ancestor and heir, husband and wife, trustee and *cestui que trust*, executors or administrators and creditors, legatees or distributees, appointer and appointee under powers, and partners and part-owners. See 1 Story's Eq. Jur., § 218; *Lee* v. *Pearce*, 68 N. C. 76. And the general principle here applicable is, that wherever a fiduciary relation exists, legal or actual, whereby trust and confidence are reposed on the one side, and influence and control are exercised on the other, courts of equity, independent of the ingredients of positive fraud, through public policy, as a protection against over-weening confidence, will interpose to prevent a man from stripping himself of his property. *Highberger* v. *Stiffler*, 21 Md. 338. See, also, *Beam* v. *Macomber*, 33 Mich. 127; *Barnes* v. *Brown*, 32 id. 146; *Fisher* v. *Budlong*, 10 R. I. 525; *Van Epps* v. *Van Epps*, 9 Paige, 241; *Dowd* v. *Tucker*, 41 Conn. 198; *Hoxie* v. *Price*, 31 Wis. 82; *Kelly* v. *McGuire*, 15 Ark. 555; *Martin* v. *Martin*, 35 Ala. 560. And the person availing himself of his position of confidence, to obtain an advantage at the expense of the confiding party, will not be permitted to retain the

advantage, although the transaction could not have been impeached if no such confidential relation had subsisted. *Tate* v. *Williamson*, L. R., 2 Ch. App. Cas. 61. But all that a court of equity requires is, that the confidence which has been reposed be not betrayed. And a transaction between parties standing in a fiduciary relation will be supported, if it can be satisfactorily shown to the court, that nothing has happened which might not have happened, had no such relation existed. Id.; *Rhodes* v. *Bate*, 1 id. 252; *Waters* v. *Bailey*, 2 Younge & Col. 219; *Smith* v. *Kay*, 7 H. L. Cas. 750. The burden of proof is, however, upon the party who fills the position of active confidence, to show that the transaction has been fair. Id.; *Gibson* v. *Jeyes*, 6 Ves. 266, 278; *Hoghton* v. *Hoghton*, 15 Beav. 288. See, also, *White* v. *Smith*, 51 Ala. 405.

The courts have never decided, as a broad principle, that mere inadequacy of price, unconnected with direct fraud or imposition, or concealment, or advantage taken of extreme weakness or great necessity, should be a distinct and independent ground for vitiating contracts. *Borell* v. *Dann*, 2 Hare, 440; *Harrison* v. *Guest*, 8 H. L. Cas. 481; S. C., 6 De G., M. & G. 434; *Osgood* v. *Franklin*, 2 Johns. Ch. 1; S. C. affirmed, 14 Johns. 527. But wherever the courts perceive that a sale of property has been made at a grossly inadequate price such as would shock a correct mind, this inadequacy furnishes a strong, and in general a conclusive presumption, though there is no direct proof of fraud, that an undue advantage has been taken of the ignorance, the weakness, or the necessity and distress of the vendor; and this imposes upon the purchaser the necessity of removing this violent presumption by the clearest evidence of the fairness of his conduct. *Butler* v. *Haskell*, 4 Dessau. (S. C.) 651. And see, also, *Cribbins* v. *Markwood*, 13 Gratt. (Va.) 495; *Farnam* v. *Brooks*, 9 Pick. 212; *Steele* v. *Worthington*, 2 Ohio, 182; *Wintermute* v. *Snyder*, 2 Green's (N. J.) Ch. 489.

§ 12. **Proof of fraud.** One who alleges fraud must clearly and distinctly prove the fraud he alleges. See *Warren* v. *Gabriel*, 51 Ala. 235; *Beatty* v. *Fishel*, 100 Mass. 448; *Vanbibber* v. *Beirne*, 6 W. Va. 168; *Klein* v. *Horine*, 47 Ill. 430; *Morgan* v. *Olvey*, 53 Ind. 6. But direct and positive proof of fraud is not required. *Strauss* v. *Kranert*, 56 Ill. 254; *Stikeman* v. *Dawson*, 1 De G. & Sm. 105. It may be established by proving circumstances from the existence of which a fraudulent intent is a natural and irresistible inference. *Waddingham* v. *Loker*, 44 Mo. 132; *Bowden* v. *Bowden*, 75 Ill. 143; *Matter of Vanderveer*, 20 N. J. Eq. 463; *McDaniel* v. *Baca*, 2 Cal. 326; *Farmer* v. *Calvert*, 44 Ind. 209; *Stewart* v. *Strasburger*, 51 How. 388; *Kaine* v. *Weigley*, 22 Penn. St. 179. And circumstances, trivial

in themselves, may, when combined together, afford irrefragable proof of fraudulent intent. *Hopkins* v. *Sievert*, 58 Mo. 201. See *Brady* v. *Barnes*, 42 Conn. 512. But circumstances of mere suspicion will not warrant the conclusion of fraud. *Taylor* v. *Fleet*, 4 Barb. 95; *Clarke* v. *White*, 12 Pet. 178. And if the case made out is consistent with fair dealing and honesty, the charge of fraud fails. *Pares* v. *Pares*, 33 L. J. Ch. 218. And see *Steele* v. *Kinkle*, 3 Ala. 352. While a court can in some cases properly infer fraud from certain facts found, yet it is constructive or legal as distinguished from actual fraud, and the inference is one of law and not of fact. *Brady* v. *Barnes*, 42 Conn. 513.

In order to establish fraud, the true rule in all courts is, to require such legal evidence as will overcome in the mind of the tribunal the legal presumption of innocence, and beget a belief of the truth of the allegation of fraud. *Marksbury* v. *Taylor*, 10 Bush (Ky.), 519. Evidence of acts done before any rights of the parties charging fraud had supervened, which tend to illustrate the conduct of the parties, and develop their relations, is admissible. *Craig's Appeal*, 77 Penn. St. 448. And see *Moog* v. *Benedicks*, 49 Ala. 512; *United States* v. *A quantity of tobacco*, 6 Ben. (Dist. Ct.) 68; *King* v. *Fitch*, 2 Abb. Ct. App. 508; S. C., 1 Keyes, 432.

Where one of feeble mind enters into a contract with a person in whom he has confidence, so that he trusts such person to do right toward him and guard his interest, if there is any unfairness in the transaction, the presumption is that the contract was obtained by fraud, or undue influence. *Simonton* v. *Bacon*, 49 Miss. 582. And see *ante*, 442, § 11.

Where a person seeks to rescind a contract, on the ground of fraud, evidence is competent which has a tendency to show that the conduct of the person seeking the rescission has been such as to repel any inference that a fraud has been practiced upon him, or to show that he adhered to the contract after having discovered the fraud. *Woodruff* v. *Garner*, 39 Ind. 246.

Courts will never assume fraud from mere obscurity or apparent error; and especially, when, from lapse of time, it has become impossible to clear up the obscurity or explain the error. *Picot* v. *Bates*, 47 Mo. 390, 392. Nor is fraud to be presumed from the incorrectness of a debtor's expressed estimate of the value of his property. *Artman* v. *Bell*, 9 Phil. (Penn.) 237. And an assignment for the benefit of creditors is held to be persuasive evidence that the assigned property was not bought with fraudulent intent. Id.

Whether one party has superior and exclusive information of the

subject-matter of a contract, and is thereby enabled to deceive, and does deceive the other, is held to be purely a question of fact, and not of law. *Smith* v. *Webb*, 64 N. C. 541.

On questions of intent to defraud, other acts similar to the offense charged, done at or about the same time, or when the same motive to offend may reasonably be supposed to have existed, as that which is in issue, are admissible with a view to the *quo animo*. *Irving* v. *Motley*, 7 Bing. 543; *Rowley* v. *Bigelow*, 12 Pick. 307; *Hoxie* v. *Home Insurance Company*, 32 Conn. 21; *Knotwell* v. *Blanchard*, 41 id. 614; *Van Kleek* v. *Leroy*, 4 Abb. Ct. App. 479; S. C., 4 Abb. (N. S.) 431; *Cary* v. *Hotailing*, 1 Hill (N. Y.), 311. The case of fraud is among the few exceptions to the general rule, that other offenses of the accused are not relevant to establish the main charge. Id. But it has been held, that the cases where, for the purpose of proving a particular fraud, evidence of other similar fraudulent transactions is admissible, are confined to those of a conspiracy to commit fraud. And that evidence that the defendant has been guilty of other like frauds is never admissible for the purpose of showing his bad character, and the greater probability on that account of his having committed the particular fraud charged. *Edwards* v. *Warner*, 35 Conn. 517.

Fraud, whether in a record or deed, or writing under seal, may be proved by parol evidence. *Robinson* v. *Lord Vernon*, 7 C. B. (N. S.) 231; *Rogers* v. *Hadley*, 2 H. & C. 227. And if a person be induced by fraudulent statements to enter into a written contract, it is competent for him to prove fraud by evidence *aliunde*, although the written contract, or the deed of conveyance, is silent on the subject to which the fraudulent representation refers. *Hotson* v. *Browne*, 9 C. B. (N. S.) 442; *Dobell* v. *Stevens*, 3 B. & C. 623; *Wilson* v. *Watts*, 9 Md. 356; *Holbrook* v. *Burt*, 22 Pick. 546; Kerr on Fraud and Mis. 388.

A chancellor, like a jury, must have such evidence as will satisfy the mind to a reasonable degree, that a fraud has been committed before he will be justified in finding its existence. *Marksbury* v. *Taylor*, 10 Bush (Ky.), 519. He cannot find fraud as a fact, on less evidence, or evidence different from that which would be required to authorize a jury to find the same fact. Id. The true rule in all courts is, to require such legal evidence as will overcome in the mind of the tribunal the legal presumption of innocence, and beget a belief of the truth of the allegation of fraud. Id.

§ 13. **Frauds by agents.** See *ante*, Vol. 1, 264. It is a well-settled rule, that the false and fraudulent representations of an agent, when acting within the scope of his authority, bind the principal. *Udell* v. *Atherton*, 7 H. & N. 172; *Mackay* v. *Commercial Bank of*

New Brunswick, L R., 5 P. C. 394. If an agent defrauds the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may no doubt rescind, when he discovers the fraud, on the terms of making complete restitution But so long as he retains the benefits of the dealing he cannot claim immunity on the ground that the fraud was committed by his agent and not by himself. *Elwell* v. *Chamberlin*, 31 N. Y. (4 Tiff.) 611; *Mundorff* v. *Wickersham*, 63 Penn. St. 87; S. C., 3 Am. Rep. 531; *Allin* v. *Millison*, 72 Ill. 201; *Lawrence* v. *Hand*, 23 Miss. 103; *Graves* v. *Spier*, 58 Barb. 349; S. C. affirmed, 49 N. Y. (4 Sick.) 657; *Lee* v. *Pearce*, 68 N. C. 76. He must adopt the whole contract, including the statements and representations which induced it, or must repudiate the contract altogether. Id.; *Barwick* v. *English Joint Stock Bank*, L. R., 2 Exch. 265; *Bristow* v. *Whitmore*, 9 H. L. Cas. 418; *Crump* v. *U. S. Mining Co*, 7 Gratt. (Va.) 352. And where an agent employs another person to make representations, it is the same as if the representations had been made by him. *Western Bank of Scotland* v. *Addie*, L. R., 1 Sc. App. 159. But the rule which charges the principal with the knowledge of his agent is for the protection of innocent third persons; and if a person colludes with an agent to cheat the principal, the latter is not responsible for the act or knowledge of the agent. *National Life Insurance Co.* v. *Minch*, 53 N. Y. (8 Sick.) 144

A corporation can no more repudiate the fraudulent conduct of its agents than an individual can. *Ranger* v. *Great Western Railway Co.*, 5 H. L. Cas. 86; *Rives* v. *Montgomery South Plankroad Co.*, 30 Ala. 92; *Litchfield Bank* v. *Peck*, 29 Conn. 384. See *Custar* v. *Titusville Water & Gas Co.*, 63 Penn. St. 381. Nor can a corporation retain any benefit which it may have obtained through the fraudulent representations of its agents, but is responsible to the extent to which it may have profited from such representations. *Henderson* v. *Lacon*, L. R., 5 Eq. 249, 261. So a partnership firm is bound by false and fraudulent representations made by one of its members, or by their agent, acting within the scope and limits of his authority. *Locke* v. *Stearns*, 1 Metc. (Mass.) 560; *Rapp* v. *Latham*, 2 B. & Ald. 795. See *Goldberg* v. *Dougherty*, 7 J. & Sp. (N. Y.) 189.

But a principal is not bound by the false and fraudulent representations of his agent, unless the latter be acting within the scope of his authority. *Ayre's Case*, 25 Beav. 513; *New Brunswick, etc., Railway Co.* v. *Conybeare*, 9 H. L. Cas. 739; *Ex parte Agace*, 2 Cox, 312. And an agent whose authority is unknown cannot bind his

principal by misrepresenting the authority. See title *Agency*, *ante*, Vol 1, pp. 213–291.

Where an agent, vested with a power to sell the property of his principal, makes a sale within the limits of his authority, which he believes to be for the best interest of his principal, the fact that, in making the sale, the impelling motive which actuated him was the compensation he was to receive, not his duty to his principal, does not give the latter a right of action for fraud in case the sale proves disadvantageous. *Price* v. *Keyes*, 62 N. Y. (17 Sick.) 378.

§ 14. **Of notice.** There is a class of frauds upon third parties, which consists of cases where a man takes or purchases property with notice of the legal or equitable title of other persons to the same property, and seeks to defeat their just rights by appropriating the property to his own use. In all such cases he will not be permitted to protect himself against such claims, but courts of equity will hold him a trustee for the benefit of the persons whose rights he has thus sought to defraud or defeat. *Murray* v. *Ballou*, 1 Johns. Ch. 566; *Heatley* v. *Finster*, 2 id. 158; *Cory* v. *Eyre*, 1 De G., J. & S. 149; *Carter* v. *Carter*, 3 Kay & J. 617; *Wilcoxen* v. *Morgan*, 2 Col. 473; 1 Story's Eq. Jur., § 395. And a *feme covert* or an infant is as much bound by notice as an adult. *Jones* v. *Kearney*, 1 Dr. & W. (Ir. Ch.) 166.

Notice may be either actual and positive, or implied and constructive; but in respect to its consequences there is no difference between them. *Sheldon* v. *Cox*, 2 Eden. Ch. 224; *Wormald* v. *Maitland*, 35 L. J. Ch. 69. In case of actual notice, knowledge of the fact is brought directly home to the party; but in order to be binding, it must proceed from some one interested in the property. *Barnhart* v. *Greenshields*, 9 Moore's P. C. C. 18. Actual notice embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstance from which a jury would be warranted in inferring notice. It is a mere question of fact, and is open to every species of legitimate evidence which may tend to strengthen or impair the conclusion. *Williamson* v. *Brown*, 15 N. Y. (1 Smith) 354. Constructive notice, on the other hand, is a legal inference from established facts; and, like other legal presumptions, does not admit of dispute. Id.; *Birdsall* v. *Russell*, 29 N. Y. (2 Tiff.) 220, 250; *Rogers* v. *Jones*, 8 N. H. 264; *Hewitt* v. *Loosemore*, 9 Eng. Law & Eq. 35; S. C., 9 Hare, 449; *Davis* v. *Bigler*, 62 Penn. St. 242, 1 Am. Rep. 393. A man has constructive notice of such facts ashe might have ascertained, but for his own want of care and prudence. *Ogilvie* v. *Jeaffreson*, 2 Giff. 353; S. C., 6 Jur. (N. S.) 970; *Pringle* v. *Phillips*, 5 Sandf. (N. Y.) 157, 171; *Blaisdell* v. *Stevens*, 16 Vt. 173; *Booth*

v. *Barnum*, 9 Conn. 386. Or, whatever is sufficient to put a party upon inquiry is, in equity, held to be good notice to bind him. *Green* v. *Slayter*, 4 Johns. Ch. 38; *Pearson* v. *Daniel*, 2 Dev. & Bat. (N. C.) Eq. 360; *Coy* v. *Coy*, 15 Minn. 119. See *Griffith* v. *Griffith*, 1 Hoff. Ch. 153. But mere suspicion or a vague and indeterminate rumor is not sufficient to put a man upon inquiry. *Lamont* v. *Stimson*, 5 Wis. 443; *Wilson* v. *McCullough*, 28 Penn. St. 440. There must be a reasonable certainty as to time, place, circumstances, or persons. *General Steam Navigation Co.* v. *Rolt*, 6 C. B. (N. S.) 550. And see *Ware* v. *Egmont*, 4 De G., M. & G. 460; *Briggs* v. *Taylor*, 28 Vt. 180; *Wilson* v. *Wall*, 6 Wall. 83.

A recorded deed is an instance of constructive notice. It is of no consequence whether the second purchaser has actual notice of the prior deed or not. He is bound to take, and is presumed to have, the requisite notice. *Williamson* v. *Brown*, 15 N. Y. (1 Smith) 354; *Christmas* v. *Mitchell*, 3 Ired. (N. C.) Eq. 535; *Wormley* v. *Wormley*, 8 Wheat. 421. So, notice of a lease will be notice of its contents. *Hall* v. *Smith*, 14 Ves. 426; *Clements* v. *Welles*, L. R., 1 Eq. 200. And if a purchaser has notice that property is held under a lease, he cannot object that he had no notice of any particular covenant contained in the lease. *Chesterman* v. *Gardner*, 5 Johns. Ch. 29; *Daniels* v. *Davison*, 16 Ves. 249; *Spunner* v. *Walsh*, 10 Irish Eq. 380. A tenant is likewise fixed with notice of all covenants of his lessor. *Feilden* v. *Slater*, L. R., 7 Eq. 523. But see *Carter* v. *Williams*, L. R., 9 Eq. 678.

Possession is another instance of constructive notice. See *Holmes* v. *Powell*, 8 DeG., M. & G. 580; *Johnston* v. *Glancy*, 4 Blackf. (Ind.) 94; *Hanly* v. *Morse*, 32 Me. 287; *Patton* v. *Hollidaysburg*, 40 Penn. St. 206. But the possession and occupation which is sufficient to put a person upon inquiry, and which will be equivalent to actual notice of rights or equities in persons other than those who have a title upon record, must be actual, open and visible; it must not be equivocal, occasional, or for a special or temporary purpose; neither must it be consistent with the title of the apparent owner by the record. See *Norcross* v. *Widgery*, 2 Mass. 508; *Moyer* v. *Hinman*, 13 N. Y. (3 Kern.) 180; *Colby* v. *Kenniston*, 4 N. H. 262; *Webster* v. *Van Steenbergh*, 46 Barb. 212; *Trustees of Union College* v. *Wheeler*, 61 N. Y. (16 Sick.) 88. Notice will not be imputed to a purchaser except where it is a reasonable and just inference from the visible facts. Nor will the principles of constructive notice apply to unimproved lands, nor to cases where the possession is ambiguous or liable to be misunderstood. *Patten* v. *Moore*, 32 N. H. 382. Nor to an uninhabited

and unfinished dwelling-house. *Brown* v. *Volkening*, 64 N. Y. (19 Sick.) 76. And the use of lands for pasturage or for cutting timber is not such an occupancy as will charge a purchaser or incumbrancer with notice. *Holmes* v. *Stout*, 10 N. J. Eq. 419; *McMechan* v. *Griffing*, 3 Pick. 149. So, it has been held that, at most, possession is merely implied notice, which may be rebutted, and in this respect differs from constructive notice, which cannot be rebutted. *Hewes* v. *Wiswell*, 8 Me. 94.

Possession by a tenant is not notice of the landlord's title. *Smith* v. *Dall*, 13 Cal. 510. Nor is the possession of an intruder notice of the title of a stranger. *Wright* v. *Wood*, 23 Penn. St. 120. Joint possession by a vendor and vendee is no notice of an unrecorded deed. *Smith* v. *Yule*, 31 Cal. 180. And in *Scott* v. *Gallagher*, 14 Serg. & R. 333, the court held, that the possession of a *cestui que trust*, and the exercise by him of acts of ownership, were not constructive notice to a purchaser of the legal title from the trustee; but that there should be direct, express and positive notice of the trust.

And in this country, where the registration of deeds, as matters of title, is universally provided for, courts of equity will not enlarge the doctrine of constructive notice, nor follow English cases, except with cautious attention to their application to the circumstances of our country, and to the structure of our laws. *Flagg* v. *Mann*, 2 Sumner, 486, 557.

To constitute constructive notice, it is not necessary that it should be brought home to the party interested himself. Notice to an agent is constructive notice to the principal; and it would not in the least avail the latter to show that the agent had neglected to communicate the fact. *Williamson* v. *Brown*, 15 N. Y. (1 Smith) 354. See, also, *Boursot* v. *Savage*, L. R., 2 Eq. 134; *Miller* v. *Fraley*, 21 Ark. 22; *Worden* v. *Williams*, 24 Ill. 67; *Jones* v. *Bamford*, 21 Iowa, 217; *Rolland* v. *Hart*, 6 Ch. App. Cas. 678. But notice to bind the principal should be notice in the same transaction, or negotiation. *Bank of United States* v. *Davies*, 2 Hill, 452; *McCormick* v. *Wheeler*, 36 Ill. 114. And notice to a man is not notice to his wife. *Sponable* v. *Snyder*, 7 Hill, 427. So, the rule that notice to a solicitor is notice to his client is held to be applicable only as between parties dealing hostilely with each other. *Austin* v. *Tawney*, L. R., 2 Ch. App. Cas. 143.

Actual notice to one partner is constructive notice to all. *Watson* v. *Wells*, 5 Conn. 468. But this rule does not apply to the case of a corporation or joint-stock company. *In re Carew's Estate*, 31 Beav. 45; *Housatonic Bank* v. *Martin*, 1 Metc. (Mass.) 294; *Wakeman* v.

Dalley, 51 N. Y. (6 Sick.) 27; S. C., 10 Am. Rep. 551. Nor is a partner necessarily fixed with notice of the contents of his own books. See *Stewart's Case*, L. R., 1 Ch. App. Cas. 574.

The record of a deed which the law does not require to be recorded is not constructive notice. *Galpin* v. *Abbott*, 6 Mich. 17; *Commonwealth* v. *Rodes*, 6 B. Monr. (Ky.) 171; *Villard* v. *Robert*, 1 Strobh. (S. C.) Eq. 393. And so, if the record itself is not in compliance with the law. *Isham* v. *Bennington Iron Co.*, 19 Vt. 230; *Galt* v. *Dibrell*, 10 Yerg. (Tenn.) 146; *Tillman* v. *Cowand*, 12 Sm. & M. (Miss.) 262. See, also, *Wood* v. *Cochrane*, 39 Vt. 544; *Stevens* v. *Hampton*, 46 Mo. 404; *ante*, Vol. 2, 496. And if there exists a material variance between the record copy and the deed, the record is not constructive notice. *Jennings* v. *Wood*, 20 Ohio, 261; *Frost* v. *Beekman*, 1 Johns. Ch. 288. But the execution of a conveyance of land by the owner, in his rightful name, though different from that in which he acquired it, when duly recorded, will operate as constructive notice of the sale and transfer of the title. *Fallon* v. *Kehoe*, 38 Cal. 44.

And where one having no title to lands executes a mortgage thereon, with covenants of seizin and of title, and afterward acquires title, it inures to the benefit of the mortgagee; and the mortgagor and his privies in estate, in blood and in law, are estopped from questioning that, at the date of the mortgage, the mortgagor had title. A record, therefore, of the mortgage, prior to the acquisition of title by the mortgagor, is constructive notice to a subsequent purchaser in good faith. *Tefft* v. *Munson*, 63 Barb. 31; S. C. affirmed, 57 N. Y. (12 Sick.) 97.

ARTICLE II.

WHAT FRAUDS ARE ACTIONABLE.

Section 1. In general. In the celebrated English case of *Pasley* v. *Freeman*, 3 Term R. 51, Smith's Lead. Cas., it was held that a false affirmation made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action on the case in the nature of deceit; and that in such action it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the party who is benefited. That case, it has been said, went not upon any new ground, but upon the application of a principle of natural justice, long recognized in the law, that fraud or deceit, accompanied with damage, is a good cause of action. Kent, Ch. J., in *Upton* v. *Vail*, 6 Johns. 181. This principle has been since

repeatedly recognized, and it may now be regarded as well settled in English and American jurisprudence, that where a person asserts a falsehood with a fraudulent design, and damage results therefrom, though he may have no interest in the deception, nor colludes with the party who has, it is ground for a civil action. *Polhill* v. *Walter*, 3 B. & Ad. 114; *Foster* v. *Charles*, 7 Bing. 106; *Behn* v. *Kemble*, 7 C. B. (N. S.) 260; *Taylor* v. *Ashton*, 11 M. & W. 401; *Hart* v. *Tallmadge*, 2 Day (Conn.), 382; *Hubbard* v. *Briggs*, 31 N. Y. (4 Tiff.) 518; *Allison* v. *Tyson*, 5 Humph. (Tenn.) 449; *Rolfes* v. *Russel*, 5 Oregon, 400; *Eames* v. *Morgan*, 37 Ill. 260; *McAleer* v. *McMurray*, 58 Penn. St. 126; *Oldham* v. *Bentley*, 6 B. Monr. (Ky.) 428. And if the representation be false, it has been held to be immaterial that it may have been made without any fraudulent intent. *Foster* v. *Charles*, 7 Bing. 105; *Murray* v. *Mann*, 2 Exch. 538; *Gerhard* v. *Bates*, 2 El. & Bl. 476; *Barry* v. *Croskey*, 2 Johns. & H. 21; *Boyd* v. *Browne*, 6 Penn. St. 310. But see *Haycraft* v. *Creasy*, 2 East, 92; *Ormrod* v. *Huth*, 14 M. & W. 651; *Lord* v. *Goddard*, 13 How. (U. S.) 198; *Young* v. *Covell*, 8 Johns. 25.

But fraud and injury must concur to furnish ground for judicial action. Fraud without damage, or damage without fraud, will not do *Freeman* v. *McDaniel*, 23 Ga. 354; *Taylor* v. *Guest*, 58 N. Y. (13 Sick.) 262, 266; *Nye* v. *Merriam*, 35 Vt. 438; *Hanson* v. *Edgerly* 29 N. H. 343; *Clarke* v. *White*, 12 Pet. 178. It is not, however, essential to the support of an action for false representations, that the representation should have been addressed directly to the plaintiff. If it were made with the intent to influence every one to whom it might be communicated, or who might read or hear of it, the latter class of persons would be in the same position as those to whom it was directly communicated. *Cazeaux* v. *Mali*, 25 Barb. 578. See *Zabriskie* v. *Smith*, 13 N. Y. (3 Kern.) 322; *Smither* v. *Calvert*, 44 Ind. 242. Nor is it essential to a right of action that the misrepresentations were the sole inducement to a sale. It is enough that the plaintiffs would not have parted with their goods, if the false representations had not been made. *Barrett* v. *Western*, 66 Barb. 205; *Safford* v. *Grout*, 120 Mass. 20.

A purchaser may, after conveyance, bring an action on the case for a fraudulent misrepresentation of the property, or the title (*Gerhard* v. *Bates*, 2 El. & Bl. 476; *Pilmore* v. *Hood*, 5 Bing. N. C. 97; S. C., 6 Scott, 827; *Love* v. *Oldham*, 22 Ind. 51); or he may recover the purchase-money, if the circumstances of the case entitle him to rescind the contract. *Early* v. *Garrett*, 4 M. & R. 687; S. C., 9 B. & C. 928; *Shackleford* v. *Handy*, 1 A. K. Marsh. (Ky.) 497; *White* v.

Seaver, 25 Barb. 235; *Pearsoll* v. *Chapin*, 44 Penn. St. 9; Kerr on Fraud and Mis. 327.

And where the vendor of personal property makes fraudulent representations in regard to its value, or is otherwise guilty of fraud in making or performing the contract, the vendee has his election of remedies for the injury; he may stand to the bargain, even after he has discovered the fraud, and recover damages on account of it, or he may rescind the contract and recover back what he has paid. *Towers* v. *Barrett*, 1 Term R. 133; *Boorman* v. *Jenkins*, 12 Wend. 566; *Waring* v. *Mason*, 18 id. 425. In all cases of fraud, the vendee, who alone has the right of disaffirmance, may remain silent, and bring his action to recover damages for the fraud, or may rely on it by way of defense to the action of the vendor, although there has been a full acceptance by him, with knowledge of the defects in the property. An affirmance of the contract by the vendee, with such knowledge, merely extinguishes his right to rescind the sale. His other remedies remain unimpaired. *Whitney* v. *Allaire*, 4 Denio, 554; *Heastings* v. *McGee*, 66 Penn. St. 384; *Peck* v. *Brewer*, 48 Ill. 55. And see *Pearsoll* v. *Chapin*, 44 Penn. St. 9; *Warren* v. *Cole*, 15 Mich. 265; *Carroll* v. *Rice*, Walk. (Mich.) Ch. 373; *Cushing* v. *Wyman*, 38 Me. 589; *Cook* v. *Gilman*, 34 N. H. 556.

§ 2. **Instances and illustrations.** Willfully telling an untruth to a party, to induce him to alter his condition, whereby he is induced to alter it, is a fraud in law, for which an action will lie. *Murray* v. *Mann*, 2 Exch. 538; *Watson* v. *Poulson*, 15 Jur. 1111. And see *Traill* v. *Baring*, 4 DeG., J. & S. 318. If A makes inquiry of B as to the circumstances of C, with respect to opening an account with him as a general customer, and B fraudulently misrepresents them in consequence of which A sells C goods from time to time, and is afterward a loser by him, an action lies for the deceit, although the buyer pays for the first parcel of goods, on the purchase of which the reference is made. *Hutchinson* v. *Bell*, 1 Taunt. 558. But if A inquires generally of B concerning the circumstances of C, A cannot maintain an action against B for a deceitful representation upon this subject if C pays A for the goods which it was in contemplation to sell when the representation was made, although C becomes insolvent, and is indebted to A for other goods subsequently sold. *DeGraves* v. *Smith*, 2 Camp. 533. So, there can be a recovery against a person making a false representation of the means of one who referred to him, only of such damage as is justly and immediately referable to the false representation. If the tradesman give an indiscreet and ill-judging credit, he cannot make the referee answerable for any loss occasioned

thereby. *Corbett* v. *Brown*, 5 C. & P. 363; S. C., 8 Bing. 35; 1 M. & Scott, 85. And see *Harrison* v. *Savage*, 19 Ga. 310; *Smither* v. *Calvert*, 44 Ind. 242.

An individual is not obliged to answer inquiries in respect to the solvency of a third person, but, having undertaken to do so, he is bound by every consideration of fairness and honesty, as well as by law, to speak truthfully; and he is not at liberty to suppress a fact within his own knowledge bearing materially upon the pecuniary responsibility of such third person. *Viele* v. *Goss*, 49 Barb. 96; S. C. affirmed, 51 N. Y. (6 Sick.) 624; *Devoe* v. *Brandt*, 53 N. Y. (8 Sick.) 462. So, it has been held, that a positive assertion as to another's solvency, made by one who ought to have known, and was supposed to know his condition, with the intention of inducing a sale, renders the maker liable. *Corbett* v. *Gilbert*, 24 Ga. 454. See, also, *Hall* v. *Bradbury*, 40 Conn. 32; *Marsh* v. *Falker*, 40 N. Y. (1 Hand) 562.

The omission of a purchaser of goods upon credit, to disclose his insolvency, is not necessarily fraudulent. *Nichols* v. *Pinner*, 18 N. Y. (4 Smith) 295; *Fish* v. *Payne*, 7 Hun, 586; *Rodman* v. *Thalheimer*, 75 Penn. St. 232. But if the purchase be made with a preconceived design not to pay for the goods, it is a fraud. *Byrd* v. *Hall*, 1 Abb. Ct. App. 285; S. C., 2 Keyes, 646; *Morrill* v. *Blackman*, 42 Conn. 324. And so, if he received the goods with such design. *Smith* v. *Frank*, 2 Rob. (N. Y.) 626. And a design not to pay for the goods may be inferred by the jury from the circumstances and conduct of the vendee, not only in respect to the sale in question, but in respect to other contemporaneous transactions. *Frisbee* v. *Fitzsimons*, 3 Hun, 674; *Hennequin* v. *Naylor*, 24 N. Y. (10 Smith) 139; *Van Kleek* v. *Leroy*, 4 Abb. (N. S.) 431; S. C., 4 Abb. Ct. App. 479. See *Skinner* v. *Flint*, 105 Mass. 528.

An action will lie for deceit and warranty in the sale of a horse, no matter what the consideration to be paid was, or whether it was paid down or not. *Applebee* v. *Rumery*, 28 Ill. 280. The owner of a horse which had the heaves, and was worthless, in the course of a negotiation for an exchange, concealed the defect, and affirmed that the horse was worth $100, and the other party not knowing of the defect, was thereby induced to make the exchange. This state of facts was held to be sufficient to sustain an action, on the case for deceit. *Stevens* v. *Fuller*, 8 N. H. 463. See, also, *Howard* v. *Gould*, 28 Vt. 524; *Litchfield* v. *Hutchinson*, 117 Mass. 195. So, if the vendor of sheep infected with a contagious disease conceals the disease from the vendee, he is liable in damages for the fraud. *Marsh* v. *Webber*,

13 Minn. 109. But an action for fraud and deceit in the sale of a horse, by means of false and fraudulent representations, made with knowledge of their falsity and with intent to deceive, cannot be maintained without proof of a *scienter*. *Marshall* v. *Gray*, 39 How. 172; S. C., 57 Barb. 414. See, also, *Morton* v. *Scull*, 23 Ark. 289; *Pettigrew* v. *Chellis*, 41 N. H. 95; *Moore* v. *Noble*, 36 How. 385; S. C., 53 Barb. 425; *Wootten* v. *Callahan*, 26 Ga. 366; *Taylor* v. *Frost*, 39 Miss. 328; *Hartford, etc., Insurance Co.* v. *Matthews*, 102 Mass. 221; *Hallam* v. *Todhunter*, 24 Iowa, 166. To recover damages for deceit in selling a horse, knowing it to be fatally diseased, the plaintiff is not, however, bound to offer to return the horse before he can maintain the action. *Heastings* v. *McGee*, 66 Penn. St. 384. And see *Salomon* v. *Van Praag*, 48 How. (N. Y.) 338.

An action may be maintained against a person for deceit in making false representations as to the solvency of a mercantile firm of which he was a member, although a judgment has been recovered against the firm, for goods sold on credit in consequence of such representations. *Morgan* v. *Skidmore*, 55 Barb. 263; S. C. affirmed, 6 Alb. L. J. 173; *Goldberg* v. *Dougherty*, 7 Jones & Sp. 189. So, if a person be induced by false and fraudulent representations made by the promoters of a proposed corporation, to pay money for shares, he may recover damages for the deceit against the individuals by whom it was practiced, notwithstanding they did not convert the money to their own use. He is not limited, in such case, to an action against the corporation. *Paddock* v. *Fletcher*, 42 Vt. 389. See *Arthur* v. *Griswold*, 55 N. Y. (10 Sick.) 400.

An action on the case will lie against one, who by false and fraudulent representations as to facts which he asserts have actually taken place, induces another to buy of him an interest in a patent right, when the latter is thereby damnified. And the plaintiff need only prove such of the allegations in the declaration as to the means used, as are sufficient to constitute the fraud. *Somers* v. *Richards*, 46 Vt. 170.

The person making a material misrepresentation without knowledge, and acquiring benefit by the transaction, is liable, as if guilty of fraud, by adoption, at least so far as the property or its proceeds are concerned; and to escape the imputation of fraud he should surrender the property. *Du Flon* v. *Powers*, 14 Abb. (N. S.) 391. See *Wakeman* v. *Dalley*, 51 N. Y. (6 Sick.) 27; S. C., 10 Am. Rep. 551.

Although, upon a sale of property, a warranty of quality is taken by the vendee, yet, if it appear that he was induced to make the purchase and to take the warranty in reliance upon representations on the part

of the vendor knowingly false and fraudulent, an action *ex delicto* may be maintained. *Indianapolis, etc., Railway Co.* v. *Tyng*, 63 N. Y. (18 Sick.) 653.

In an action against several persons as joint tort-feasors, to recover for damages from alleged false and fraudulent representations to the plaintiff, a combination between the defendants to deceive the plaintiff must be shown. And in the absence of any proof of such conspiracy, the acts or declarations of one of the alleged conspirators are not competent evidence against the others. *Brinkley* v. *Platt*, 40 Md. 529. See, also, *Kimball* v. *Harmon*, 34 id. 407; 6 Am. Rep. 304; *Page* v. *Parker*, 40 N. H. 66. But see *Bruce* v. *Kelly*, 7 J. & Sp. (N. Y.) 27, 39.

The procuring of property, real or personal, upon a promise which one does not intend to perform, is a fraud. Thus, where one told his aunt, who had bequeathed to him all her property, that she need not trouble herself to sign a codicil, giving a certain piece of real estate to her niece, as he would convey the same to the niece, but after the aunt's death, without signing, refused so to convey, he was held to be guilty of a fraud. *Dowd* v. *Tucker*, 41 Conn. 198. And see *Ayres* v. *French*, id. 142.

If a party, knowing himself to be insolvent or in failing circumstances, by means of fraudulent pretenses or representations, purchases goods, with the design to cheat the vendor out of the same, the latter may rescind the sale for fraud, and recover the goods by replevin, if they have not passed into the hands of innocent purchasers. *Patton* v. *Campbell*, 70 Ill. 72.

ARTICLE III.

WHAT FRAUDS ARE NOT ACTIONABLE.

Section 1. In general. As a general rule, a seller's mere false allegation of value is no ground for an action by the purchaser (*Picard* v. *McCormick*, 11 Mich. 68; *Ellis* v. *Andrews*, 56 N. Y. [11 Sick.] 83; S. C., 15 Am. Rep. 379; *ante*, art. 1, § 5), unless the purchaser has been fraudulently induced to forbear inquiry. *Parker* v. *Moulton*, 114 Mass. 99; S. C., 19 Am. Rep. 315; *Simar* v. *Canaday*, 53 N. Y. (8 Sick.) 298; 13 Am. Rep. 523. But whether representation as to value was a mere expression of opinion or belief, or an affirmation of a fact to be relied on, has been held to be a question of fact for a jury. Id.

An action for a fraudulent misrepresentation of facts will not lie, where the defendant is under no legal obligation to communicate such

facts to the plaintiff (*Otis* v. *Raymond*, 3 Conn. 413); nor, if both parties had equally the means of knowledge. *Strong* v. *Peters*, 2 Root (Conn.), 93; *Slaughter* v. *Gerson*, 13 Wall. 379; *Cronk* v. *Cole*, 10 Ind. 485. See *ante*, art. 1, § 2. The rule of the common law in cases of executed sales of personal property is, that the vendor is not liable for damages arising from latent defects known to him and unknown to the purchaser, except where the vendor has warranted the article sold, or has made false representations, or has used some active means to conceal such defects, or some artifice to mislead or deceive the purchaser as to such defects. If the vendor is merely *silent*, he is not responsible for damages by reason of such defects. *Fleming* v. *Slocum*, 18 Johns. 403; *Paul* v. *Hadley*, 23 Barb. 521. And see *Gerkins* v. *Williams*, 3 Jones' (N. C.) L. 11; *ante*, art. 1, §§ 2 and 3.

The mere fact that a trustee allows his name and credit to be used to float the stock of a corporation, which afterward turns out to be worthless, in the absence of evidence of knowledge on his part, or that he has made or sanctioned any false representations, does not constitute actionable fraud. *Morgan* v. *Skiddy*, 62 N. Y. (17 Sick.) 319.

See generally, as to what is requisite to render false statement fraudulent and actionable, *ante*, art. 1.

§ 2. **Instances and illustrations.** An action for fraudulent acts, intended to induce, and by which a creditor was induced not to secure a debt by legal process, by which means he lost the debt, will not lie at common law, even though a conspiracy for the purpose be charged. *Lamb* v. *Stone*, 11 Pick. 527; *Austin* v. *Barrows*, 41 Conn. 287. The damages in such a case are too remote. Id. So, it has been held that an action for damages will not lie for false and fraudulent representations made by the defendant in reference to his own pecuniary responsibility and circumstances, whereby the plaintiff was induced to sell him property upon credit. *Dyer* v. *Tilton*, 23 Vt. 313; *Jude* v. *Woodburn*, 27 id. 415. Nor will an action for damages lie upon a seller's false representations either as to what a patent right cost him, or at what price he had sold territory rights therefor, or upon his expressions of opinion as to its merits or prospective profits. *Bishop* v. *Small*, 63 Me. 12. But see *Somers* v. *Richards*, 46 Vt. 170.

In an action for a deceit in the sale of a horse, where the unsoundness alleged was the loss of the frogs of the feet, which might have been discovered on an ordinary inspection, nothing having been done or said by the seller to prevent inquiry, — it was held that the plaintiff was not entitled to recover. *Thompson* v. *Morris*, 5 Jones' (N. C.) L. 151.

A agreed to buy a number of horses from B, and it was referred to

an arbitrator to decide upon the value of the horses. The arbitrator decided that two of them were worthless, having an incurable and contagious decease, and so informed A. Afterward A took them at reduced prices, by a subsequent agreement, and kept them with his other horses, whereby he lost a number of them, — and it was held that A could not maintain an action on the case in the nature of deceit against B. *Murray* v. *M' Lean*, 2 Ired. (N. C.) L. 93.

So, where a person selling cattle at a fixed price per pound, the weight to be afterward ascertained, voluntarily relinquishes his rights to have them weighed, and agrees to accept a sum in gross which is paid to him, he cannot afterward, in the absence of any fraud on the part of the purchaser, maintain an action against him, to recover the difference between the gross sum received, and the value of the cattle by weight, at the price originally stipulated. And even though the purchaser has, before the making of the second agreement, ascertained the exact weight of the cattle, in the absence of the vendor, and conceals from him the fact that the cattle have been weighed, that will not constitute a fraud for which an action will lie, so long as the purchaser neither says nor does any thing to mislead or deceive the vendor in respect to the actual weight. *Gage* v. *Parker*, 25 Barb. 141.

In an action to recover the amount of a subscription to the capital stock of an oil company, on the ground that such subscription was made in consequence of the false representations of the defendant, — it was held, that if the result of the false representations or the intent of the defendant at the time, was not to benefit himself, the plaintiff could not recover. *Schanck* v. *Morris*, 7 Rob. (N. Y.) 658. And see *Wakeman* v. *Dalley*, 51 N. Y. (6 Sick.) 27; S. C., 10 Am. Rep. 551.

Where one party, upon being sued by another for rent, promised to pay the amount due in a few days if the party bringing the suit would discontinue it, and he promised to do so, it was held, that no action would lie against the plaintiff in such suit, for fraud, upon the failure to perform his promise to discontinue the action. *Farrington* v. *Bullard*, 40 Barb. 512.

A misrepresentation of the legal effect of the language of a deed is not a ground of action. When the contents of a deed are known to the grantee he is bound to know the legal effects thereof. *Smither* v. *Calvert*, 44 Ind. 242.

Where once a fraud has been committed, not only is the person who has committed the fraud precluded from deriving any benefit from it, but every innocent person is so likewise, unless there has been some consideration moving from himself. *Scholefield* v. *Templer*, 1 Johns.

155; S. C., *on appeal*, 4 De G. & J. 429. And if two persons combine to defraud a third party, and one of them receives money from such third party in execution of the fraudulent transaction, no action will lie against him by the other person to recover any portion of the money so received. *Boyd* v. *Barclay*, 1 Ala. 34. But it seems that where an instrument has been entered into between two parties, for a purpose which may be considered fraudulent as against a third party, it may yet be binding as between themselves. *Shaw* v. *Jeffery*, 13 Moore's P. C. C. 432.

A man cannot collaterally impeach, or call in question, a judgment of a court of law, or a decree in equity, to which he is a party. No action, therefore, will lie, for obtaining a decree by false and forged evidence, while such decree remains in force. *Peck* v. *Woodbridge*, 3 Day (Conn.), 30. And in an action upon a judgment, fraud in obtaining it cannot be set up as a defense. *Field* v. *Sanderson*, 34 Mo. 542.

An action to set aside a decree alleged to have been obtained by fraud and false testimony cannot be maintained. *Greene* v. *Greene*, 2 Gray, 361; *Davis* v. *Davis*, 61 Me. 395. But the court which made the decree may set it aside, where it was procured by fraud. *Holmes* v. *Holmes*, 63 Me. 420; *Adams* v. *Adams*, 51 N. H. 388; 12 Am. Rep. 134; *Edson* v. *Edson*, 108 Mass. 590; 11 Am. Rep. 393.

A statement, or a representation, false in fact, but not known to be so, by the party making it, but, on the contrary, made honestly and in the full belief that it is true, is not actionable. *Evans* v. *Collins*, 5 Q. B. 805; S. C., D. & M. 669. And see *ante*, art. 1, § 7.

ARTICLE IV.

PARTICULAR CLASSES OR CASES OF FRAUD.

Section 1. In general. A class of frauds against which equity grants relief is where an agreement or other act is infected by being a fraud upon the rights, interests, or intentions of others, not parties. It is a general rule, founded on public utility, that particular persons in agreements and other acts shall not only transact *bona fide* between themselves, but shall not transact *mala fide* in respect to other persons who stand in such a relation to either as to be affected by the agreement or the consequences of it. *Chesterfield* v. *Janssen*, 2 Ves. Sr. 125, 156. See, also, *Garth* v. *Cotton*, 1 Dick. 217; Kerr on Fraud and Mis. 195.

Some illustrations of this rule will be given in the following sections.

§ 2. **In contracts relating to marriage.** One class of frauds upon third parties, against which relief may be had in equity, is where persons after doing acts required to be done on a treaty of marriage, render those acts unavailing by entering into other secret agreements, or derogate from those acts or otherwise commit a fraud upon the relatives or friends of one of the contracting parties. Thus, where a creditor of the intended husband concealed his own debt and falsely represented to the lady's father the extent of the intended husband's indebtedness, the transaction was treated as a fraud upon the marriage, and the creditor was restrained from enforcing his debt at law, against the husband after the marriage. *Neville* v. *Wilkinson*, 1 Bro. C. C. 543. So, where a brother, on the marriage of his sister, let her have a sum of money privately to increase her fortune so as to be apparently as much as was insisted on by the other side, and the sister gave a bond to the brother for its repayment, the bond was set aside. *Gale* v. *Lindo*, 1 Vern. 475; *Lamlee* v. *Hanman*, 2 id. 499. See, also, in illustration of fraud upon marriage articles, *Bell* v. *Clarke*, 25 Beav. 436; *Palmer* v. *Neave*, 11 Ves. 166; 1 Story's Eq. Jur., §§ 266–272; Kerr on Fraud and Mis. 215, 216. Marriage brokage bonds, which are not fraudulent on either party, are yet void, because they are a fraud on third persons, and a public mischief; as they have a tendency to cause matrimony to be contracted on mistaken principles, and without the advice of friends, and they are relieved against, as a general mischief, for the sake of the public. Parsons, C. J., in *Boynton* v. *Hubbard*, 7 Mass. 112.

Courts of equity frequently interpose to afford relief in cases of fraud, actual or constructive, in marriage settlements. And where no formal marriage settlement has been entered into, any disposition made by a woman, in contemplation of marriage, of her property to her own separate use, without the knowledge of her intended husband has been held void, as being in derogation of his marital rights and just expectations. See *Bowes* v. *Strathmore*, 2 Bro. Ch. 345; S. C., 2 Cox, 28; *Downes* v. *Jennings*, 32 Beav. 599; *Loader* v. *Clarke*, 2 M, & G. 387; *Wrigley* v. *Swainson*, 3 De G. & Sm. 458; *McAfee* v. *Ferguson*, 9 B. Monr. (Ky.) 475; *Waller* v. *Armistead*, 2 Leigh (Va.), 11; *Linker* v. *Smith*, 4 Wash. (C. C.) 224. So, if prior to her marriage, a woman should represent herself to her intended husband to be possessed of property, which she should secretly convey before the marriage, the husband would be entitled to relief against such conveyance. *England* v. *Downs*, 2 Beav. 522; *Williams* v. *Carle*, 2 Stockt. (N. J.) Ch. 543; 1 Story's Eq. Jur., § 273. And a voluntary conveyance made by a man on the eve of marriage, unknown to the intended wife and

made for the purpose of defeating the interest which she would acquire in the estate by the marriage, is fraudulent and void. *Swain* v. *Perine*, 5 Johns. Ch. 482; *Youngs* v. *Carter*, 50 How. (N. Y.) 410; *Smith* v. *Smith*, 2 Halst. (N. J.) Ch. 515. The same rule would seem to be applicable to conveyances by a husband in fraud of the rights of the wife pending proceedings for divorce. *Blenkinsopp* v. *Blenkinsopp*, 1 De G., M. & G. 495.

But the disposition of her property by a woman after a contract of marriage, and before it has been solemnized, is not, as a matter of course, to be set aside, because the husband was not a party, or privy thereto, but each case is to be determined by it own peculiar circumstances. See *St. George* v. *Wake*, 1 Myl. & K. 610; *Taylor* v. *Pugh*, 1 Hare, 608; *Maher* v. *Hobbs*, 2 Younge & Col. 317; *Terry* v. *Hopkins*, 1 Hill's (S. C.) Ch. 4. Thus, it is held that a reasonable provision made by a woman for the children of a former marriage, under circumstances of good faith, will be sustained. *Green* v. *Goodall*, 1 Coldw. (Tenn.) 404; *Tucker* v. *Andrews*, 13 Me. 124, 128; *De Manneville* v. *Compton*, 1 Ves. & B. 354. But see *Ramsay* v. *Joyce*, 1 McMull. (S. C.) Eq. 237; *Manes* v. *Durant*, 2 Rich. (S. C.) Eq. 404. So, if the husband has so conducted himself toward the intended wife, that she cannot, without dishonor to herself, retire from the marriage, as where he had induced her to cohabit with him prior to marriage, a settlement made by her of her property, without his knowledge, will not be treated as in fraud of his marital rights. *Taylor* v. *Pugh*, 1 Hare, 608. Nor has the husband any remedy, if before the marriage he has notice that the intended wife has dealt in some way with her property. *St. George* v. *Wake*, 1 Myl. & K. 610. See, also, *Logan* v. *Simmons*, 3 Ired. (N. C.) Eq. 487. And if a bond be given by a woman about to marry, without her intended husband's knowledge, but for a valuable consideration in respect of an antecedent debt, he will not be relieved against it. *Blanchet* v. *Foster*, 2 Ves. Sr. 264. So, the husband may lose the right to impeach a transaction, as being in fraud of his marital rights, by long acquiescence or delay. *Downes* v. *Jennings*, 32 Beav. 290; *Loader* v. *Clarke*, 2 Mac. & G. 382. And his representatives after his death have no equity against the wife, if he does not before his death discover the fraud upon his marital rights. *Grazebrook* v. *Percival*, 14 Jur. 1103.

A secret settlement by a woman of her property during a treaty of marriage is not necessarily void at law. *Richards* v. *Lewis*, 11 C. B. 1035.

And a contract by which persons are mutually bound to marry each other will be valid at law. *Cock* v. *Richards*, 10 Ves. 438. But a

bond under a penalty to marry a particular person, if given in fraud of parents or persons *in loco parentis*, will be set aside in equity *Woodhouse* v. *Shepley*, 2 Atk. 536.

An action on the case is maintainable by a woman against a married man who, by his deceit in representing himself as a single man, is led into a void marriage with him; and the right of action survives against his personal representative. *Withee* v. *Brooks*, 65 Me. 14. See *Cropsey* v. *Sweney*, 27 Barb. 310.

§ 3. **In contracts relating to services.** The relation of principal and agent is of a confidential character, demanding the utmost truth and good faith between them; and so sedulously is this principle guarded, that all departures from it are esteemed frauds upon the confidence bestowed. *Bruce* v. *Davenport*, 36 Barb. 349; *Keighler* v. *Savage Manufacturing Co.*, 12 Md. 383. Agents are not permitted to become secret vendors or purchasers of property which they are authorized to buy or sell for their principals. *Reed* v. *Warner*, 5 Paige, 650; *Banks* v. *Judah*, 8 Conn. 145; *Hobday* v. *Peters*, 28 Beav. 349; *Lewis* v. *Hillman*, 3 H. L. Cas. 607; *Kimber* v. *Barber*, L. R., 8 Ch. App. Cas. 56; 4 Eng. R. 753. An agent who purchases property for himself, which he is employed to purchase for another, becomes a trustee for his employer. *Pillsbury* v. *Pillsbury*, 17 Me. 107; *Wellford* v. *Chancellor*, 5 Gratt. (Va.) 39; *Moore* v. *Mandlebaum*, 8 Mich. 433; *Gardner* v. *Ogden*, 22 N. Y. (8 Smith) 327. And generally, however fair the transaction may be in other respects, any underhand dealing on the part of an agent will render it impeachable at the election of the principal. *Gillett* v. *Peppercorne*, 3 Beav. 78; *Wentworth* v. *Lloyd*, 32 id. 467; *Segar* v. *Edwards*, 11 Leigh (Va.), 213; *Barton* v. *Moss*, 32 Ill. 50. See *ante*, Vol. 1, title *Agency*.

§ 4. **In contracts for the sale of real estate.** False and fraudulent affirmations by the vendor of lands, that "said lands had large deposits of oil in them, and were of great value for the purpose of digging, boring for, and manufacturing oil," accompanied by the statement that the lands had not been tested, are held to be merely matters of opinion and not actionable. *Martin* v. *Jordon*, 60 Me. 531. So, it was held that false representations by the vendor of a water power that the dam supplied "about three times as much" power as was conveyed, could not be regarded as fraudulent, where such dam furnished to the vendees the full amount conveyed to them. *Morrison* v. *Koch*, 32 Wis. 254. And where the vendor, by articles, agreed to convey to the purchaser 350 acres more or less, but the land was 306 acres, and the deed was for 302 acres more or less, it was held, in an action for the purchase-money, that an instruction that this deficiency

was no evidence of fraud, was correct. *Young* v. *Edwards*, 72 Penn. St. 257. See *ante*, art. 1, § 5.

But an action on the case will lie for false and fraudulent representations made by a vendor of land, in regard to the quantity in the tract. *Harlow* v. *Green*, 34 Vt. 379.

If a man purchase land for himself and others, without disclosing to them the price paid therefor, and is guilty of concealment and misrepresentations as to the terms of the purchase, the advanced price paid may be recovered back. *Rhea* v. *Surryhne*, 39 Cal. 579; *Short* v. *Stevenson*, 63 Penn. St. 95. So, fraudulent representations by a president of a railroad company, that a certain harbor and depot property was worth three times its actual value, were held to be not mere matter of opinion, but a ground for avoiding a contract of sale of land obtained thereby. *McClellan* v. *Scott*, 24 Wis. 81. And a misrepresentation of the law, by a brother-in-law to his sister-in-law, whereby she was led to believe her title to property held by her was invalid, and therefore made a sale to him much to his advantage, was held to vitiate the sale at her election, although the misrepresentation was made in good faith. *Sims* v. *Ferrill*, 45 Ga. 585.

In an action for fraud in the sale of lands, perpetrated by pointing out and pretending to sell to one ignorant of the manner of describing lands in deeds, and unable to read, a parcel of valuable land, and then fraudulently deeding in lieu thereof a different and worthless parcel, evidence of the fraudulent transaction cannot be excluded on the ground that the agreement to sell the land, not being in writing, was void under the statute of frauds. *Ochsenkehl* v. *Jeffers*, 32 Mich. 482.

Where a third person, not the owner of land, but knowing more than others of the occult qualities or internal values of land, and knowing or believing the condition to be one thing, represents the facts differently, to the prejudice of the owner, he is liable in damages. *Paull* v. *Halferty*, 63 Penn. St. 46; 3 Am. Rep. 518. If a vendor is in negotiation for the sale of land containing ore, and the defendant, knowing the land, falsely represents to the intended purchaser that the ore will suddenly run out, and a sale to him is thereby prevented, an action lies for the fraud. Id.

So where one holds out inducements to another, whose estate is largely incumbered, that he will provide means for him to redeem, whereby the latter is prevented from looking elsewhere, and in the mean time the former purchases such incumbrances and cuts off the redemption, he is held to be guilty of fraud, and will not be allowed to enforce his advantage. The remedy in such case is by way of redemption. *Wilson* v. *Eggleston*, 27 Mich. 257.

It is only upon the ground of fraud, or that some one may have been prejudiced by a sale of real estate *en masse*, that the sale will be set aside in equity because the property was not sold in separate parcels. *Ross* v. *Mead*, 5 Gilm. (Ill.) 171; *Gillespie* v. *Smith*, 29 Ill. 481.

A vendor who falsely represents that a tract of land offered for sale, by him, embraces a designated portion of good land, is liable for the fraud if it induced the vendee to make the purchase. *Munroe* v. *Pritchett*, 16 Ala. 785. And it is not necessary to prove that the vendor knew that the representation was false at the time he made it. Id.

§ 5. **In contracts for the sale of personal property.** See, as to fraud in auction sales, Vol. 1, 482, *et seq.* See *Sales.*

A contract to purchase shares of stock induced by fraudulent representations or concealment is not void, but only voidable. *Upton* v. *Burnham*, 3 Biss. 431. See *Nelson* v. *Taylor*, 46 How. (N. Y.) 355; S. C., 4 J. & Sp. 544; S. C. affirmed, 62 N. Y. (17 Sick.) 645. Where B, the president of an insurance company, advised a stockholder therein to sell his stock at a certain price to a third person, who obtained it for B, and then transferred it to B,—it was held, that B was liable to the seller for the difference between the real value of the stock and the price for which it was sold. *Fisher* v. *Budlong*, 10 R. I. 525.

Where a party fraudulently obtains certain articles of property from another, but receives the property as a definite sum of money, the party defrauded may elect, if he chooses, to treat such property as such sum of money. *Bainter* v. *Fults*, 15 Kans. 323.

In an action for deceitfully exchanging property with the plaintiff upon which another had a lien, it is not incumbent upon the plaintiff to show that he had no notice of the lien at the time of exchange. *Patee* v. *Pelton*, 48 Vt. 182. And where a sale of personal property is brought about by false representations on the part of the seller, it is error to charge the jury, in an action for the price, that the defendant cannot set up the false representations unless he further shows that he could not, at the time, have discovered the truth, by using the ordinary caution of a prudent trader. *Reid* v. *Flippen*, 47 Ga. 273.

Among circumstances considered admissible to show that a trader had bought goods without intending to pay for them, are, proceedings begun in bankruptcy, alterations made in his books of account, and that his shop was found closed and empty soon after the sale. *Skinner* v. *Flint*, 105 Mass. 528. See *Bryant* v. *Simoneau*, 51 Ill. 324.

An action for deceit will lie, where the seller expressly refuses to warrant the property as sound, and even where he represents it to be unsound. But in the latter case, the testimony should be much

stronger than in the former to maintain the action; and especially, where the price is reduced on account of the unsoundness, and the buyer has equal opportunities with the seller to judge. *Walton* v. *Jordan*, 23 Ga. 420.

§ 6. **In contracts of a fiduciary nature.** The jurisdiction exercised by a court of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. And although the principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, the courts have nevertheless been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. See *ante*, 442, art. 1, § 11, and cases cited. In general, wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed. *Tate* v. *Williamson*, L. R., 2 Ch. App. Cas. 56; and see *ante*, 442, art. 1, § 11. But it cannot reasonably be said that a mere trifling gift to a person standing in a confidential relation, or a mere trifling liability incurred in favor of such a person, ought to stand in the same position as a gift of a man's whole property, or a liability involving it, would stand in. In such cases the court will not interfere to set them aside upon the mere fact of the existence of a confidential relation, and the absence of proof of competent and independent advice. The court, before undoing the benefit conferred, would require such proof, not merely of influence derived from the relation, but of *male fides*, or of undue or unfair exercise of the influence. *Rhodes* v. *Bate*, 1 Ch. App. Cas. 252. So, after the fiduciary relation terminates, it is then open to the parties to deal on the same terms as strangers. Id. See *Carter* v. *Palmer*, 8 Cl. & Fin. 657; *Holman* v. *Loynes*, 4 De G., M. & G. 270.

§ 7. **In contracts as to trust property.** A familiar instance of the application of the doctrine which forbids a man who fills a position of a fiduciary character to derive any benefit from the person toward whom he occupies such relation, is in the case of actual trustees. The well-established principle is, that one charged with the duty of protecting and caring for property as trustee cannot deal with or become the purchaser of it for his own advantage, and to the prejudice of the *cestui que trust*. *Lytle* v. *Beveridge*, 58 N. Y. (13 Sick.)

592; *Fulton* v. *Whitney*, 5 Hun (N. Y.), 16; *Mitchell* v. *Moore*, 6 Bush (Ky.), 659; *Freeman* v. *Harwood*, 49 Me. 195. And this principle is not confined to trustees properly so called, but is universal, and applies to all persons having a duty to perform in reference to a sale, inconsistent with the character of purchaser. *Torrey* v. *Bank of Orleans*, 9 Paige, 649; S. C., 7 Hill, 260. Thus, it applies to executors and administrators (*Allfrey* v. *Allfrey*, 1 Mac. & G. 87; *Davoue* v. *Fanning*, 2 Johns. Ch. 252; *Meanor* v. *Hamilton*, 27 Penn. St. 137); to committees of lunatics (*Wright* v. *Proud*, 13 Ves. 136); to assignees of a bankrupt (*Ex parte Bennett*, 10 id. 381; *Pooley* v. *Quilter*, 2 De G. & J. 327); to directors of a railway or other company (*Gaskell* v. *Chambers*, 26 Beav. 360; *Spence* v. *Whittaker*, 3 Port. [Ala.] 297; *Cumberland Coal Co.* v. *Sherman*, 30 Barb. 553; *Hoyle* v. *Plattsburgh, etc., R. R. Co.*, 54 N. Y. [9 Sick.] 314; 13 Am. Rep. 595; *Hoffman Steam Coal Co.* v. *Cumberland Coal & Iron Co.*, 16 Md. 456); to a pledgee (*Baltimore Marine Ins. Co.* v. *Dalrymple*, 25 Md. 269, 302); to a *prochein ami* (*Collins* v. *Smith*, 1 Head [Tenn.], 251); to receivers (*Buddington* v. *Langford*, 15 Ir. Ch. 558); to arbitrators (*Blennerhassett* v. *Day*, 2 B. & B. 16); to commissioners of bankrupts and other judicial officers (*Ex parte James*, 8 Ves. 338; *Campbell* v. *Pennsylvania Life Ins. Co.*, 2 Whart. [Penn.] 53); and to numerous other cases. See *Denton* v. *Donner*, 23 Beav. 285; *Beaden* v. *King*, 9 Hare, 499; *Dimes* v. *Proprietors Grand Junction Canal*, 3 H. L. Cas. 759; *Hallett* v. *Collins*, 10 How. (U. S.) 174; *Att.-General* v. *Lord Clarendon*, 17 Ves. 500. Purchases by a trustee, at a sale under the trust agreement, are null, *ipso jure*, and may be avoided by the *cestui que trust*, at his option, and irrespective of the question as to whether the bargain was advantageous or detrimental to either party. *Wormley* v. *Wormley*, 8 Wheat. 421; *Wasson* v. *English*, 13 Mo. 176; *Charles* v. *Dubose*, 29 Ala. 367; *Armstrong* v. *Campbell*, 3 Yerg. (Tenn.) 201; *Hunt* v. *Bass*, 2 Dev. (N. C.) Eq. 292; *Star Fire Ins. Co.* v. *Palmer*, 9 J. & Sp. (N. Y.) 267. And it is immaterial whether the transaction relates to real estate, to personalty, or to mercantile matters (See *Hamilton* v. *Wright*, 9 Cl. & Fin. 111; *Lewis* v. *Hillman*, 3 H. L. Cas. 607; *Parkinson* v. *Hanbury*, 2 De G., J. & S. 450; *Schwarz* v. *Wendell*, Walk. [Mich.] Ch. 267; *Narcissa* v. *Wathan*, 2 B. Monr. [Ky.] 241); or that the sale was by public auction (*Adams* v. *Sworder*, 2 De G., J. & S. 44; *Bellamy* v. *Bellamy*, 6 Fla. 62); or that the trustee may have purchased as agent for another person (*North Baltimore Building Asso.* v. *Caldwell*, 25 Md. 420); or that the purchase was made through another person (*Beeson* v. *Beeson*, 9 Penn. St. 279; *Terwilliger* v. *Brown*,

59 Barb. 1. S. C. affirmed, 44 N. Y. [5 Hand] 237); or that a third person may, by previous arrangement with the trustee, have been the purchaser in trust for the separate use and benefit of the wife of the trustee. *Davoue* v. *Fanning*, 2 Johns. Ch. 252.

But although a trustee cannot purchase of himself, he may, under special circumstances, buy from the *cestui que trust*, if the latter is *sui juris*. *Graves* v. *Waterman*, 63 N. Y. (18 Sick.) 657. This is, however, a transaction of great delicacy, and one which the court will watch with the utmost diligence. If any unfair advantage has been taken by the trustee by withholding information, or other fraudulent dealing, the transaction will at once be set aside. *Coles* v. *Trecothick*, 9 Ves. 246; *Knight* v. *Marjoribanks*, 2 Mac. & G. 10; *Sallee* v. *Chandler*, 26 Mo. 124; *Marshall* v. *Stephens*, 8 Humph. (Tenn.) 159; *Richardson* v. *Spencer*, 18 B. Monr. (Ky.) 450; *Spencer's Appeal*, 80 Penn. St. 317. And the burden is upon the trustee, to establish that there was such a *bona fide* contract as will support the purchase in a court of equity, on a careful and jealous examination of all the circumstances, and a rigid inquiry into the perfect fairness and propriety of the transaction. *Sallee* v. *Chandler*, 26 Mo. 124; *Graves* v. *Waterman*, 63 N. Y. (18 Sick.) 657.

A sale by a trustee to his *cestui que trust* stands upon the same footing as a purchase from his *cestui que trust*. *Gibson* v. *Jeyes*, 6 Ves. 266; *M'Cants* v. *Bee*, 1 McCord's (S. C.) Eq. 383.

For a further statement of the principles bearing upon this branch of the subject, see *post*, title *Trusts and Trustees*.

§ 8. **Representations as to credit of third persons.** See *ante*, 454, art. 2, § 2. If A represents B to C as worthy of credit, knowing at the same time that B is insolvent, and C sells goods to B relying on A's representation, A is liable for their value to C. *Bean* v. *Renway*, 17 How. 90; S. C., 28 Barb. 466.

So, in an action for deceit in falsely recommending a third person as worthy of credit, it is sufficient to render the defendant liable, that he willfully suppressed a fact within his knowledge, affecting such party's responsibility, even though such suppression of the truth were made solely to benefit the person recommended. *Rheem* v. *Naugatuck Wheel Co.*, 33 Penn. St. 358. See, also, *Patten* v. *Gurney*, 17 Mass. 182.

§ 9. **Contracts in fraud of creditors.** Another class of frauds upon third persons consists of those agreements or other acts of parties which tend to delay, deceive, or defraud creditors. Transactions of this sort are void at common law. See *Cadogan* v. *Kennet*, Cowp. 432; *Barton* v. *Vanheythuysen*, 11 Hare, 132. And are likewise

declared void by statute. Id. And see Vol. 1, 371, 372; *post*, title *Frauds, Statute of; Clark* v. *Douglass*, 62 Penn. St. 408.

As a general rule, the right of every one to dispose of his property as his pleasure, interest, or even caprice, may dictate, is unquestionable; and the power of courts of justice to interfere with, or in any matter to control such disposition, exists only, when the right is exerted to the prejudice of third persons. To justify a court, in inferring that a deed was made with fraudulent intentions, when no fraud in fact is proved, two things at least must concur: *First*, there must be creditors known to the parties, who may, by the provisions of the deed, be delayed, or hindered, in the collection of their debts; and, *second*, the necessary consequence of the deed must be to produce such delay, or hindrance. *Pope* v. *Wilson*, 7 Ala. 690. See, also, *Green* v. *Tanner*, 8 Metc. (Mass.) 411; *Partelo* v. *Harris*, 26 Conn. 480; *Bancroft* v. *Blizzard*, 13 Ohio, 30; *Chouteau* v. *Sherman*, 11 Mo. 385. To render a conveyance void as a fraud upon creditors, it is necessary that the grantee have knowledge of, and participate in the fraud of the grantor. Id.; *Magniac* v. *Thompson*, 7 Pet. 348; *Splawn* v. *Martin*, 17 Ark. 146. But see *Hitchcock* v. *Kiely*, 41 Conn. 611. And a fraudulent conveyance, though void as to creditors, is binding between the parties. *Anderson* v. *Bradford*, 5 J. J. Marsh. (Ky.) 69; *Randall* v. *Phillips*, 3 Mas. (C. C.) 378; *Woodman* v. *Bodfish*, 25 Me. 317; *O'Neil* v. *Chandler*, 42 Ind. 471; *Shaw* v. *Millsaps*, 50 Miss. 380. A conveyance made by a *femme sole*, on the eve of her marriage, with the privity and approbation of her intended husband, is not fraudulent against her husband's creditors. *Land* v. *Jeffries*, 5 Rand. (Va.) 211. And a mortgage of personal property by a debtor, in insolvent circumstances, to secure future advances and responsibilities, if made *bona fide*, and there is no reason to doubt the honesty and fairness of the transaction, will be deemed valid. *Hendricks* v. *Robinson*, 2 Johns. Ch. 283; S. C. affirmed, 17 Johns. 438; *Wilson* v. *Russell*, 13 Md. 494. So, it has been held, that the sale of the entire effects of an insolvent copartnership upon credit, at a fair valuation, to a responsible vendee having knowledge of the insolvency, is not *per se* fraudulent. Although made by the vendor with intent to hinder, delay, and defraud creditors, that does not affect the title of the purchaser, unless he had previous notice of the fraudulent intent. *Ruhl* v. *Phillips*, 48 N. Y. (3 Sick.) 125; S. C., 8 Am. Rep. 522.

But a mortgage made by an insolvent debtor, which covers more property than is required to secure the mortgage debt, is held to be fraudulent. *Bailey* v. *Burton*, 8 Wend. 339; *Mitchell* v. *Beal*, 8 Yerg. (Tenn.) 140. And see *Clark* v. *Douglass*, 62 Penn. St. 408.

And the length of time which a mortgage has to run may, in connection with other circumstances, be regarded as evidence of fraud. Id.; *Croft* v. *Arthur*, 3 Desaus. (S. C.) 223. Creditors have a just claim, in law and conscience, upon a debtor's earnings, for the satisfaction of their demands; and any agreement entered into by the debtor with a view to deprive his creditors of his future earnings, and enable him to retain and use them for his own benefit and advantage, will be declared void. *Tripp* v. *Childs*, 14 Barb. 85.

A conveyance which is void in part, as being given to hinder, delay and defraud creditors, is void in *toto*. A fraudulent intent as to a part of the instrument vitiates the whole, thereby rendering it void. *Hyslop* v. *Clarke*, 14 Johns. 464; *Weeden* v. *Hawes*, 10 Conn. 50; *Tickner* v. *Wiswall*, 9 Ala. 305. Thus, if a mortgage be given with the fraudulent intent to cover up and conceal from creditors a portion of the debtor's property, it is altogether void, notwithstanding it also includes land or other property in relation to which there is a *bona fide* intent to convey it as security for an honest debt, and no other purpose and intent. A mortgage, void in part as a violation of the statute, is void altogether. *Russell* v. *Winne*, 37 N. Y. (10 Tiff.) 591. So, where an assignment shows on its face that it was made in trust for the use of the assignor, either in whole or in part, the court is bound to pronounce the transaction void, without submitting the question to the jury. *Goodrich* v. *Downs*, 6 Hill, 438.

For a full statement of legal and equitable principles relative to transactions in fraud of creditors, see *post*, title *Frauds, Statute of*.

ARTICLE V.

RIGHT TO RELIEF, HOW WAIVED OR LOST.

Section 1. By confirmation. A transaction, impeachable at the time of inception on the ground of fraud, may become unimpeachable by a subsequent ratification or confirmation. Confirmation is in general the adoption of a previously formed contract, notwithstanding a vice that rendered it relatively void; and by the very nature of the act, the party confirming becomes a party to the contract. He that was not bound becomes bound by it, and entitled to all the proper benefits of it. *Pearsoll* v. *Chapin*, 44 Penn. St. 9. But confirmation must be a solemn and deliberate act. And when the original transaction is infected with fraud, the courts watch it with the utmost strictness, and do not allow it to stand but on the clearest evidence. *Cumberland Coal & Iron Co.* v. *Sherman*, 20 Md. 117. To render the act

of confirmation effective and conclusive, the party confirming must have been fully aware, at the time of the supposed confirmation, of every material circumstance of the transaction, the real value of the subject of the contract, and his act of ratification must have been an independent and substantive act, founded on complete information, and of perfect freedom of volition. *Hoffman Steam Coal Co.* v. *Cumberland Coal & Iron Co.*, 16 id. 456. And see, also, *Williams* v. *Reed*, 3 Mas. (C. C.) 405; *Boyd* v. *Hawkins*, 2 Dev. (N. C.) Eq. 195; *Savery* v. *King*, 5 H. L. Cas. 627; *Salmon* v. *Cutts*, 4 De G. & S. 132; *Potts* v. *Surr*, 34 Beav. 543; *De Montmorency* v. *Devereux*, 7 Cl. & Fin. 188; *Harrington* v. *Brown*, 5 Pick. 519; *Moore* v. *Hilton*, 12 Leigh (Va.), 2; *Musselman* v. *Eshleman*, 10 Penn. St. 394; *Jones* v. *Smith*, 33 Miss. 215. Confirmation may be by will as well as by deed. *Stump* v. *Gaby*, 2 De G., M. & G. 623.

If the injured party assents to and confirms the original transaction, the abandonment of his equitable claim removes all doubt from the legal title, and it is as if suspicion or embarrassment had never attached to it. *Comstock* v. *Ames*, 1 Abb. Ct. App. 411; S. C., 3 Keyes, 357; *Stevenson* v. *Newnham*, 16 Eng. Law & Eq. 401, 408.

§ 2. **By a release.** The principles by which the validity of a confirmation is determined are also applicable in determining the validity of a release. Thus, *cestuis que trust* cannot be bound by releases given to their trustees, if given in ignorance of their rights; for it is the duty of the trustees to apprise them of those rights. And they cannot, of course, be bound by instruments obtained from them by false representations, or under the exercise of undue influence. *Lloyd* v. *Attwood*, 3 De G. & J. 614. Releases are utterly invalid upon either of those grounds. Id. And see *Eyre* v. *Burmester*, 10 H. L. Cas. 106; *Aveline* v. *Melhuish*, 2 De G., J. & S. 289; *Farrant* v. *Blanchford*, 1 id. 119.

A written discharge of an action for a trespass, procured from the defendant, by the plaintiff or those acting for him, through fraud, intimidation, or misrepresentation of material facts, for a sum less than he would have been induced to settle for, but for such practices, is not valid. *Larrabee* v. *Sewall*, 66 Me. 376.

But where the defrauded party, with full knowledge of the fraud, settles the matter in relation to which such fraud was committed and releases the person who defrauded him, he has no claim to relief, either at law or in equity, on account of such fraud. *Parsons* v. *Hughes*, 9 Paige, 591; *Adams* v. *Sage*, 28 N. Y. (1 Tiff.) 103. See, also, *Erie Railway Co.* v. *Vanderbilt*, 5 Hun, 123; *Baker* v. *Spencer*, 47 N. Y. (2 Sick.) 562; S. C. affirmed, 58 Barb. 248.

The fact that a fraud used to induce a party to make a contract constitutes a felony does not prevent the party deceived from affirming the contract; as a waiver of a tort in a civil action would not prejudice a criminal prosecution for the felony. *Benedict* v. *National Bank of the Commonwealth*, 4 Daly (N. Y.), 171.

§ 3. **By acquiescence.** A transaction impeachable at and after its completion, may become unimpeachable without any positive act of confirmation or release. All that is required is proof of a fixed, deliberate, and unbiased determination that the transaction should not be impeached. *Wright* v. *Vanderplank*, 8 De G., M. & G. 133, 146. This may be proved by circumstances evidencing acquiescence. See id.; *Life Association of Scotland* v. *Siddall*, 3 De G., F. & J. 73; *Doughty* v. *Doughty*, 3 Halst. (N. J.) Ch. 227; *Bruce* v. *Davenport*, 1 Abb. Ct. App. 233; S. C., 3 Keyes, 472; 5 Abb. (N. S.) 185; *Edwards* v. *Roberts*, 7 Sm. & M. (Miss.) 544. But acquiescence imports knowledge, and it is a settled rule that no one can be bound by acquiescence, unless he has been fully informed of his rights, and of all the material facts and circumstances of the case. *Stewart's Case*, L. R., 1 Ch. App. Cas. 514; *Wall* v. *Cockerell*, 10 H. L. Cas. 229; *Shipp* v. *Swan*, 2 Bibb (Ky.), 82; *Flagg* v. *Mann*, 2 Sumn. (C. C.) 486. And the proof of knowledge lies on the party alleging acquiescence and setting it up as a defense. *Burrows* v. *Walls*, 5 De G., M. & G. 233; *Bennett* v. *Colley*, 2 Myl. & K. 225. The mere fact that one may have heard unfavorable rumors and conceived suspicions is insufficient to fix him with acquiescence. *Central Railway Company of Venezuela* v. *Kisch*, L. R., 2 H. L. Cas. 99, 112. He must, however, use due diligence in ascertaining the facts of the case. *Buford* v. *Brown*, 6 B. Monr. (Ky.) 553.

§ 4. **By delay or lapse of time.** Delay, or mere lapse of time, may have the effect to render unimpeachable in equity, a transaction fraudulent in its inception. Equity does not encourage stale demands, nor give relief to parties who sleep on their rights. *Beckford* v. *Wade*, 17 Ves. 87; *Coleman* v. *Lyne*, 4 Rand. (Va.) 454; *Life Association of Scotland* v. *Siddall*, 3 De G., F. & J. 73; *Lyddon* v. *Moss*, 4 De G. & J. 104. If, however, there be laches on both sides, the ordinary rules as to delay and acquiescence may not apply. *Hicks* v. *Morant*, 2 Dow. & Cl. 414.

What is a reasonable time within which a party should move after the discovery of the fraud (see *Walsham* v. *Stainton*, 1 DeG., J. & S. 678; *Longworth* v. *Hunt*, 11 Ohio St. 194) must in a great measure depend upon the exercise of the sound discretion of the court under all the circumstances of each particular case. *Foster* v. *Gressett*, 29 Ala. 393; *Cox*

v. *Montgomery*, 36 Ill. 396; *Obert* v. *Obert*, 12 N. J. Eq. 423; *Munn* v. *Worrall*, 16 Barb. 221; *Gresley* v. *Mousley*, 4 DeG. & J. 78. The question as to delay may be affected by reference to the nature of the property (*Clegg* v. *Edmondson*, 8 DeG., M. & G. 807), or by reference to the relation subsisting between the parties (*Allfrey* v. *Allfrey*, 1 Mac. & G. 87; *Gresley* v. *Mouseley*, 4 DeG. & J. 78), or by reference to the change of circumstances as to the character or value of the property in the intermediate period. *Smith* v. *Thompson*, 7 B. Monr. (Ky.) 305, 310; *M'Donald* v. *Neilson*, 2 Cow. 139; *Wentworth* v. *Lloyd*, 32 Beav. 467. Where the property is of a speculative or precarious nature the party complaining of fraud should put forward his complaint at the earliest possible time. *Jennings* v. *Broughton*, 5 DeG., M. & G. 126. He will not be permitted to remain passive, prepared to affirm the transaction if the concern should prosper, or repudiate it if that should prove to be his advantage. *Walford* v. *Adie*, 5 Hare, 112; *Banks* v. *Judah*, 8 Conn. 145.

An application after the lapse of seventeen years, to set aside a purchase of a testator's estate by his executor at an undervalue, was dismissed on the ground of delay. *Baker* v. *Read*, 18 Beav. 398. So, the court refused to set aside a lease granted to a steward, after the lapse of eleven years, although there were special circumstances in the case. *Selsey* v. *Rhoades*, 1 Bligh (N. S.), 1; S. C., 2 Sim. & Stu. 41. And an application to set aside a purchase by a trustee after a lapse of eighteen years was refused by the master of the rolls. *Gregory* v. *Gregory*, Cooper, 201. After the lapse of twenty years, it seems that a bill to be relieved against fraud will not lie though want of notice be stated. *Myers* v. *O'Hanlon*, 12 Rich. (S. C.) 196. But see *Gaines* v. *Chew*, 2 How. (U. S.) 618. And in *Michoud* v. *Girod*, 4 id. 561, it was said by Wayne, J., that "no case of actual fraud can be found in the books in which a court of equity has refused to give relief within the life-time of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it." See, also, *Farnam* v. *Brooks*, 9 Pick. 212; *Phalen* v. *Clark*, 19 Conn. 421; *Boone* v. *Chiles*, 10 Pet. 177; *State* v. *McGowen*, 2 Ired. (N. C.) Eq. 9; *Knight* v. *Bowyer*, 2 DeG. & J. 421; *Cholmondeley* v. *Clinton*, 4 Bligh, 1. That mere lapse of time will not bar infant heirs from relief on a constructive trust originating in fraud, see *Miles* v. *Wheeler*, 43 Ill. 123.

Lapse of time will not operate as a bar while a man remains under a legal disability (*Wright* v. *Vanderplank*, 8 DeG., M. & G. 133; *Carr* v. *Bobb*, 7 Dana [Ky.], 407); or while the dominion or undue influence which vitiated the transaction is in full force (*Sharp* v. *Leach*, 31

Beav. 491); nor so long as the party remains, without any fault of his own, in ignorance of his rights and injuries. *Stanhope's Case*, L. R., 1 Ch. App. Cas. 161; *Charter* v. *Trevelyan*, 11 Cl. & Fin. 714. But parties can have no equity from a disability that was voluntary and self-imposed. *Wagner* v. *Baird*, 7 How. (U. S.) 234. Nor is the poverty or pecuniary embarrassment of the defrauded party a sufficient excuse for delay. *Locke* v. *Armstrong*, 2 Dev. & Bat. (N. C.) Eq. 147; *Roberts* v. *Tunstall*, 4 Hare, 257. And the mere notice or assertion of a claim, unless accompanied by some act to give it effect, is insufficient to keep alive a right which would be otherwise barred. *Clegg* v. *Edmondson*, 8 DeG., M. & G. 787.

A stale demand, under an allegation of fraud, is not entitled to favorable consideration in equity, where there were interested creditors on the ground at the time of the transaction, ready to detect any attempts at fraud or unfairness. *Couch* v. *Couch*, 9 B. Monr. (Ky.) 160.

§ 5. **By a purchase for value without notice.** It is a well-settled rule, that as against a purchaser for valuable consideration without notice, having a legal title, a court of equity will give no relief. *Dawson* v. *Prince*, 2 DeG. & J. 41; *Cobbett* v. *Brock*, 20 Beav. 528 *Lemmon* v. *Brown*, 4 Bibb (Ky.), 308. The rule applies equally to real estate, chattels and personal estate. *Dawson* v. *Prince*, 2 DeG. & J. 41, 50; *Attorney-General* v. *Wilkins*, 17 Beav. 293. And it has been held to apply where the original sale and delivery were subject to conditions of which the purchaser was ignorant. *Hall* v. *Hinks*, 21 Md. 406. But see *Coggill* v. *Hartford, etc., R. R. Co.*, 3 Gray, 545. The true question is, whether the purchaser has acted in good faith and purchased under circumstances of apparent right in the vendor to convey. *Flagg* v. *Mann*, 2 Sumn. (C. C.) 486. It is sufficient to raise the equity of purchase for value without notice, if the purchase be from an apparent owner who was actually in possession. *Wallwynn* v. *Lee*, 9 Ves. 24. But one who takes under a forged instrument, which purports to convey a legal estate or interest, has no title at all, and cannot claim as a purchaser without notice. *Esdaile* v. *LaNauze*, 1 Younge & Col. 399. And see *Johnson* v. *Boyles*, 26 Ala. 576; *Case* v. *Jennings*, 17 Tex. 661; *Wooster* v. *Sherwood*, 25 N. Y. (11 Smith) 278.

Not only is a purchaser without notice from one who has fraudulently purchased, unaffected by the fraud (*Prevo* v. *Walters*, 4 Scam. [Ill.] 35. And see cases above cited), but a person affected by notice has the benefit of want of notice by intermediate purchasers. *McQueen* v. *Farquhar*, 11 Ves. 467; *Demarest* v. *Wynkoop*, 3 Johns. Ch. 129. Thus, a purchaser with notice, from a prior purchaser who was entitled to protection as a *bona fide* purchaser without notice, is himself entitled

to protection against the previous equitable claim, which was invalid as against his grantor. *Bumpus* v. *Platner*, 1 Johns. Ch. 213; *Lindsey* v. *Rankin*, 4 Bibb (Ky.), 482; *Pierce* v. *Faunce*, 47 Me. 507; *Church* v. *Ruland*, 64 Penn. St. 432.

But, in order to protect a party as a *bona fide* purchaser without notice, he must have acquired the *legal title* as well as an equitable right to the property. *Trustees of Union College* v. *Wheeler*, 61 N. Y. (16 Sick.) 88, 117. And he must have actually paid the purchase-money, or parted with something of value by way of payment before receiving notice. *Borell* v. *Dan*, 2 Hare, 440; *Kilcrease* v. *Lum*, 36 Miss. 569; *Doswell* v. *Buchanan*, 3 Leigh (Va.), 365. Even if the purchase-money be secured to be paid, yet if it be not in fact paid before notice, the plea of a purchaser for a valuable consideration will be overruled. *Hardingham* v. *Nicholls*, 3 Atk. 304; *Parkinson* v. *Hanna*, 7 Blackf. (Ind.) 400. See *Padget* v. *Lawrence*, 10 Paige, 170; *Ratcliffe* v. *Sangston*, 18 Md. 383; *Servis* v. *Beatty*, 32 Miss. 52; *Ely* v. *Scofield*, 35 Barb. 330. And the payment of the consideration must be affirmatively proved by other evidence than the mere receipt in the deed. *Lloyd* v. *Lynch*, 28 Penn. St. 419; *Mitchell* v. *Puckett*, 23 Tex. 573.

The rule which protects *bona fide* purchasers does not apply to purchasers of merely equitable titles. *Hallett* v. *Collins*, 10 How. (U. S.) 174. The purchaser of an equitable title must always abide by the case of the person from whom he buys, and the rule in such a case is, that he who is first in time is best in right. Id.; *Boone* v. *Chiles*, 10 Pet. 177; *Craig* v. *Leiper*, 2 Yerg. (Tenn.) 193; *Gallion* v. *McCaslin*, 1 Blackf. (Ind.) 90. And this rule is not varied by the fact, that the owner of the equitable interest who sets up the defense of purchase without notice may be in possession, and has a right to call for the legal estate. *Phillips* v. *Phillips*, 31 L. J. Ch. 321.

A *bona fide* purchaser for a valuable consideration, without notice, may also lawfully buy in or obtain any outstanding legal estate, not held upon express trust for an adverse claimant, or a judgment, or any other legal advantage, the possession of which may be a protection to himself or an embarrassment to other claimants. *Saunders* v. *Dehew*, 2 Vern. 271; *Hughes* v. *Graner*, 2 Younge & Col. 328; *Sharples* v. *Adams*, 32 Beav. 213; Kerr on Fraud and Mis. 313. This rule is the foundation of the equitable doctrine of *tacking*, as it is technically called, that is, uniting securities given at different times, so as to prevent any intermediate purchaser from claiming a title to redeem, or otherwise to discharge one lien which is prior in date, without redeem-

ing or discharging the other liens also which are subsequent to his own title. 1 Story's Eq. Jur., § 412; *Spencer* v. *Pearson*, 24 Beav. 266. The doctrine of *tacking* has been characterized as unjust and inequitable. See *Osborn* v. *Carr*, 12 Conn. 195, 210; 4 Kent's Com. 178; *Brazee* v. *Lancaster Bank*, 14 Ohio, 318. And in this country the operation of the registry laws in some of the States is, to cut up by the roots the English doctrine of tacking, so far as it affects intermediate purchasers and incumbrancers. *Siter* v. *M'Clanachan*, 2 Gratt. (Va.) 280; *Bridgen* v. *Carhartt*, Hopk. Ch. 234. See, also, *Averill* v. *Guthrie*, 8 Dana (Ky.), 82; 1 Lead. Cas. Eq. (4th Am. ed.) 853, 880.

ARTICLE VI.

REMEDIES.

Section 1. By an action at law. The remedy by an action at law in cases of fraud has been fully treated of in a preceding article. See *ante*, art. 2, §§ 1 and 2. See *Case*, Vol. 2.

Where fraud is clearly proved it should never be allowed to shield itself behind defenses that are purely technical, unless the technical difficulty is insuperable. *Lynch* v. *Hall*, 41 Conn. 238.

§ 2. **By a suit in equity.** Courts of equity will not ordinarily take jurisdiction of cases of fraud, when there is a plain, adequate, and complete remedy at law. *Miller* v. *Scammon*, 52 N. H. 609; *Learned* v. *Holmes*, 49 Miss. 290. See *Injunction*. And for most misrepresentations and frauds, there is such a remedy at law. Id. So, where a cause has once been determined at law, equity will not take cognizance of it, unless there be some equitable circumstance of which the party could not avail himself at law, to give jurisdiction. *Smith* v. *McIver*, 9 Wheat. 532. See *Singery* v. *Attorney-General*, 2 Harr. & J. (Md.) 487; *Haden* v. *Garden*, 7 Leigh (Va.), 157; *Wheeler* v. *Clinton Canal Bank*, Harr. (Mich.) Ch. 449.

Fraud vitiates contracts, obligations, deeds of conveyance, and even the records and judgments of courts, and equity will relieve against them. *Relf* v. *Eberly*, 23 Iowa, 467; *Hoitt* v. *Holcomb*, 23 N. H. 535; *Griffin* v. *Sketoe*, 30 Ga. 300. So, equity will interfere to relieve against a contract grossly against conscience, or grossly unreasonable in respect to consideration. *Barnett* v. *Spratt*, 4 Ired. (N. C.) Eq. 171. So, where a person takes advantage of a confidential relation, involving trust and good faith, to impose upon another, and by imposition, deception, or undue influence does an injury to the other, equity will lend its aid to remedy the wrong done. *Shaeffer* v. *Sleade*, 7 Blackf. (Ind.)

178; *Harkness* v. *Fraser*, 12 Fla. 336. See, also, *Calloway* v. *Witherspoon*, 5 Ired. (N. C.) Eq. 128; *Cooke* v. *Nathan*, 16 Barb. 342; *Wyche* v. *Greene*, 11 Ga. 159; *Birdsong* v. *Birdsong*, 2 Head (Tenn.), 289; *Barnes* v. *Brown*, 32 Mich. 146.

But equity will not relieve against fraud or deceptive arts from which no injury accrues. *Jewett* v. *Davis*, 10 Allen, 68; *Young* v. *Bumpass*, 1 Freem. (Miss.) Ch. 241. Nor is a misrepresentation about a mere matter of judgment (*Halls* v. *Thompson*, 1 Sm. & M. [Miss.] 443; *Payne* v. *Smith*, 20 Ga. 654); or, a misrepresentation not acted upon, a ground for a suit in equity. *Boyce* v. *Watson*, 20 Ga. 517. Nor will equity relieve a party guilty of a fraud against a *particeps criminis*. *Dismukes* v. *Terry*, Walk. (Miss.) 197. Mere inadequacy of price or consideration is not sufficient to avoid a sale fairly made. *Hardy* v. *Heard*, 15 Ark. 184; *ante*, art. 1, § 11. And a bill for the rescission of a contract on the ground of fraud or duress perpetrated after the contract was made, will not be entertained. *Fulton* v. *Loftis*, 63 N. C. 393.

As a general rule, a contract or conveyance will not be set aside for actual or constructive fraud, except at the option of the party defrauded. *Ayers* v. *Hewett*, 19 Me. 281; *Jones* v. *Hill*, 9 Bush (Ky.), 692. And the party seeking the relief must be free from any participation in the fraud. *Fitzgerald* v. *Forristal*, 48 Ill. 228. Yet one party may act under circumstances of oppression, imposition, hardship, undue influence or great inequality of condition, or age, so that his guilt may be far less in degree than that of his associate in the offense. And in such cases the court will grant relief in favor of a plaintiff who was *particeps criminis* as not being in *pari delicto*. *Osborne* v. *Williams*, 18 Ves. 379; 1 Story's Eq. Jur., § 300; *Phalen* v. *Clark*, 19 Conn. 421; *Pinckston* v. *Brown*, 3 Jones' (N. C.) Eq. 494; *Freelove* v. *Cole*, 41 Barb. 318; *Goodenough* v. *Spencer*, 15 Abb. (N. S.) 248; S. C., 46 How. 347; 2 N. Y. Sup. (T. & C.) 508.

In determining whether force, fraud, or intimidation induced the assent of one party to a transaction, a court of equity will consider all the circumstances of the case, and will refuse its aid against one who, apparently acting voluntarily, was yet subdued by such harshness, cruelty, or apprehension as must overpower and control the will, although not amounting to legal duress. *Central Bank of Frederick* v. *Copeland*, 18 Md. 305.

Where all the circumstances show the existence of a fraudulent design on the part of the defendant, to prevent the recovery of a just debt, a court of equity has jurisdiction over the subject-matter and is competent to grant relief, though the demand may be a legal one.

Cockrell v. *Warner*, 14 Ark. 345; *Jenison* v. *Graves*, 2 Blackf. (Ind.) 441; *Sheppard* v. *Iverson*, 12 Ala. 97.

§ 3. **Who may sue.** The right to an action at law, or to relief in equity, on the ground of fraud or misrepresentation, is not confined to the person to whom the false representation was made, but extends to third persons, provided it appear that the representation was made with the intent that it should be acted on by such third persons, in the manner that occasions the loss or injury. *Bagshaw* v. *Seymour*, 18 C. B. 903; *Barry* v. *Crosskey*, 2 Johns. & H. 1; *Clifford* v. *Brooke*, 13 Ves. 132; *Longmeid* v. *Holliday*, 6 Exch. 761.

Where A fraudulently obtains the property of B, the creditors of B can recover the property or its proceeds from A. *Van Winkle* v. *Smith*, 26 Miss. 491. See *Ford* v. *Aiken*, 4 Rich. (S. C.) 121. And the executor of a party defrauded may file a bill to have a transaction set aside. *Walsham* v. *Stainton*, 1 De G., J. & S. 678. So, a devisee may file a bill to set aside a transaction which has been fraudulently obtained from his testator. *Harrison* v. *Guest*, 6 De G., M. & G. 424. And if the executor fraudulently dispose of property, and die insolvent, and no administrator is appointed, and the creditors take no steps in the matter, the legatees may file a bill against the fraudulent purchaser. *Bledsoe* v. *Bledsoe*, 29 Ga. 385. The heir at law of a person seized in fee may maintain a suit to set aside a transaction into which his ancestor has been induced by fraud to enter. *Gresley* v. *Mousley*, 4 De G. & J. 78; *Longmate* v. *Ledger*, 2 Griff. 157; *Bellamy* v. *Sabine*, 2 Phillips, 425. And if several persons have been induced, by false and fraudulent representations, to take shares in or subscribe to an undertaking, each one may institute a suit on his own behalf for a rescission of the contract, or for a return of the moneys which he has advanced. *Craidland* v. *De Manley*, 1 De G. & Sm. 459; *Re Reese Silver Mining Co.*, L. R., 2 Ch. App. 604; *Crosskey* v. *Bank of Wales*, 4 Griff. 314; Kerr on Fraud and Mis. 372. But see *Beeching* v. *Lloyd*, 3 Drew. 242; *Macbride* v. *Lindsay*, 9 Hare, 574. So, a person partially interested in an estate may maintain a suit to set aside a conveyance of such interest fraudulently obtained from him, without making the other persons interested in the estate parties. *Henley* v. *Stone*, 3 Beav. 355.

But a suit may be properly maintained by one or more of a number of partners, on behalf of himself, or themselves, and all others whose interest is identical with his or their own, when the object of the suit is to make an officer of the company account for a secret benefit or advantage obtained by him, in breach of the good faith owing to those whose affairs he conducts (*Lund* v. *Blanshard*, 4 Hare, 9; *Beck* v.

Kantorowiez, 3 Kay & J. 230); or to rescind a contract into which the partnership has been induced to enter, by false and fraudulent representations. *Small* v. *Attwood*, Younge, 407; Kerr on Fraud and Mis. 373.

Where a debtor makes a fraudulent conveyance of his property, for the purpose of protecting it from his creditors, the fraudulent grantee may enforce such conveyance at law, and the debtor will not be permitted to defeat the claim, by proving the fraud. *Starke* v. *Littlepage*, 4 Rand. (Va.) 368.

A person who has purchased land, relying upon the fraudulent representations of the vendor as to the quantity, and has paid for the same, but has not taken a deed, may nevertheless maintain an action for such fraudulent misrepresentations. *Harlow* v. *Green*, 34 Vt. 379.

§ 4. **Who may not sue.** A fraud is an individual and personal thing, and does not form a claim on behalf of a stranger to the transaction not claiming under the party defrauded. And a recovery by any other person is no defense to a claim by the party defrauded. *Comstock* v. *Ames*, 1 Abb. Ct. App. 411; S. C., 3 Keyes, 357. See, also, *Beesley* v. *Hamilton*, 50 Ill. 88.

He who comes into a court of equity for relief must do so with clean hands, and if he shows fraud on his own part, equity will not relieve him against the fraud of others. *Cunningham* v. *Shields*, 4 Hayw. (Tenn.) 44; *Wilson* v. *Bird*, 28 N. J. Eq. 352; *ante*, 199, 201. And see *ante*, 476, § 2. So, if a party, knowing that he has been defrauded, subsequently confirms the original transaction by new agreements and engagements respecting it, he thereby waives the fraud, and abandons his claim to equitable relief. *Hanson* v. *Field*, 41 Miss. 712; *ante*, 470, art. 5, § 1. But no act of a party will amount to a confirmation of a transaction, fraudulent as to him, unless done with a full knowledge that he has been defrauded. Id.; *Broddus* v. *McCall*, 3 Call. (Va.) 472.

If A write a letter to B, desiring him to introduce the bearer to such merchants as he may desire, and describing him as a man of property, and the bearer does not deliver the letter to B, but uses it to obtain credit with C, C cannot maintain an action for deceit against A, though the representations in the letter are untrue. *McCracken* v. *West*, 17 Ohio, 16.

But if A, by reason of a contract with B, gives his note to C, a creditor of B, A cannot be relieved from his note to C on account of a fraud by B, in his contract with A. *Williamson* v. *Raney*, Freem. (Miss.) Ch. 112.

§ 5. **Who may be sued.** All the members of a firm are liable for

the fraud of one of them (*Hawkins* v. *Appleby*, 2 Sandf. [N. Y.] 421), or of their agent, in the course of his employment, within the proper scope of the partnership business. *Locke* v. *Stearns*, 1 Metc. (Mass.) 560. See, also, *Blair* v. *Bromley*, 2 Phillips, 354; *St. Aubyn* v. *Smart*, L. R., 5 Eq. 183. And this is so although the other members of the firm were entirely ignorant of the fraud, and derived no benefit therefrom. *Hawkins* v. *Appleby*, 2 Sandf. (N. Y.) 421.

A party who makes a false affirmation, whereby another sustains damage, is liable to an action, although he has no interest of his own to serve. *Bean* v. *Herrick*, 12 Me. 262. And an action may be maintained against two persons jointly, for knowingly making false representations at the time of a sale, although one only was interested in the expected fruits of the fraud. *Stiles* v. *White*, 11 Metc. (Mass.) 356. So, two joint owners are proper parties in an action for fraudulent representations made by one of them, acting for both, in a sale of the joint property. *White* v. *Sawyer*, 16 Gray, 586. And see *Walsham* v. *Stainton*, 1 DeG., J. & S. 678.

Where a complainant seeks to set aside an assignment, or deed of trust, on the ground that it is fraudulent, he is at liberty to proceed against the fraudulent assignee or trustee, without joining the *cestui que trust*. *Rogers* v. *Rogers*, 3 Paige, 379.

Where goods are stolen, or obtained by means of a fraud amounting to a felony, the owner may retake them, even as against a *bona fide* purchaser from the thief, or the fraudulent vendee. *Hoffman* v. *Carow*, 22 Wend. 285; *Hardman* v. *Booth*, 1 H. & C. 803. So, where goods are obtained fraudulently, but not feloniously, a purchaser from the fraudulent holder cannot defeat the claim of the original owner, unless he purchased in good faith, and without notice of the fraud. See *ante*, 474, art. 5, § 5. And where he parted with no new consideration, and the purchase was out of the usual course, at a sum less than the value of the goods, under circumstances of great suspicion, such as altered and defaced marks upon the boxes, etc.,—it was held, that he was not a *bona fide* purchaser. *Robinson* v. *Dauchy*, 3 Barb. 20.

The remedy, in cases of fraud, is not defeated by the death of the wrong-doer, but the same relief may be had against his executors, and satisfaction will be given out of his estate. *Garth* v. *Cotton*, 3 Atk. 751, 757; *Rawlins* v. *Wickham*, 3 De G. & J. 304; *Curtis* v. *Curtis*, 2 Bro. C. C. 620. The estate of a deceased partner of a firm of solicitors was held liable for a fraud committed by the surviving partner. *Sawyer* v. *Goodwin*, 15 W. R. 1008; S. C., 36 L. J. Ch. 578.

A third party who has been privy to a fraud may be made a party to the bill. *Turquand* v. *Knight*, 14 Sim. 643. And if one has aided

in a fraud, the absence of a personal benefit resulting from it will not relieve him from responsibility, at least for costs. *Seddon* v. *Connell*, 10 Sim. 85. It is not, however, necessary that all the parties charged with fraud should be made parties. Id.

A mortgagee holding a mortgage given by a person holding title under a fraudulent conveyance, is a proper party to a suit to set aside such conveyance; and so are all persons who participated in making the conveyance. *Miller* v. *Jamison*, 24 N. J. Eq. 41.

Where several persons have been jointly concerned in a series of fraudulent acts, they may be united as defendants in a suit to annul such acts, although the gains they realize therefrom are several. *Andrews* v. *Pratt*, 44 Cal. 309. If the subject of an action be real or personal property, and the plaintiff seeks to set aside fraudulent judicial proceedings in reference thereto, he should make all persons parties who were actors in such proceedings, and who claim a present interest in the specific property. Such a complaint is not liable to the objection that there is an improper joinder of several causes of action against different persons. It sets up one cause of action against all of them. *Howse* v. *Moody*, 14 Fla. 59.

§ 6. **Who may not be sued.** A participation by several in a conspiracy to commit a fraud is not of itself sufficient to render them liable to be joined as defendants in the same action. *Cramer* v. *Hernstadt*, 41 Tex. 614.

Where an action was brought against the members of a firm for fraudulently procuring goods, it was held, that as the fraud charged was actual, intentional fraud, implying moral turpitude, and followed by imprisonment as a punishment, a defendant could not be found guilty merely because his partner committed the fraud. *Stewart* v. *Levy*, 36 Cal. 159. See preceding section.

And where a wagoner took rags from the depot of a railroad company, to his employer's paper mill, supposing them to be his, where they were used, it was held, that the employer was not, by the act of taking, merely, involved in the consequences of a fraud. *Pennsylvania Railroad Company* v. *Zug*, 47 Penn. St. 480.

So, an action for fraud will not lie against a purchaser who makes false affirmations in favor of himself in order to obtain a future day of payment. *Fisher* v. *Brown*, 1 Tyler (Vt.), 387. And see *ante*, 458, art. 3, § 2.

§ 7. **Damages as a remedy.** In an action for fraudulent misrepresentation, the plaintiff may recover damages for any injury which is the direct and natural consequences of his acting on the faith of the defendant's representations. *Mullett* v. *Mason*, L. R., 1 C. P. 559.

Or, the rule as otherwise stated is, that the wrong-doer must answer for those results, injurious to the other party, which must be presumed to have been within his contemplation at the time of the commission of the fraud. *Crater* v. *Binninger*, 33 N. J. Law, 513.

The measure of damages, in an action for deceit in the sale of a farm, is the difference between the value of the farm as represented, and the actual value when such farm was conveyed. To such sum may be added as damages a sum equivalent to interest from the time when the conveyance was made. *Wright* v. *Roach*, 57 Me. 600. For fraudulent representations as to the quantity of the land sold, the measure of damages is the amount of the purchase-money paid on the deficient quantity, with interest thereon. *Hiner* v. *Richter*, 51 Ill. 299.

The proper mode of measuring damages in an action against directors of a company for false representations as to the affairs of the company, whereby they induced a party to purchase shares which were worthless, is to ascertain the difference between the purchase-money paid, and what would have been a fair price to be paid for the share, according to the true circumstances of the company at the time of the purchase. *Huntingford* v. *Massey*, 1 F. & F. 690. And the measure of damages for false representations in the sale of the defendant's interest in the stock and good-will of a firm of which he was a member, is held to be the difference between the actual value of the interest at the time of the purchase and its value if it had been what it was represented to be. *Morse* v. *Hutchins*, 102 Mass. 439.

Where the owner of a promissory note of an insolvent person has, by a fraud, put it off on an innocent purchaser, he is liable to refund to the latter the money received for it, with interest. *Clayton* v. *O'Conner*, 35 Ga. 193. And where the seller of a promissory note which had been paid, knowingly misrepresented at the time of the sale that it was still due and unpaid, the measure of damages was held to be the full amount of the note. *Sibley* v. *Hulbert*, 15 Gray, 509. See *Neff* v. *Clute*, 12 Barb. 466.

As to the true measure of damages in certain cases of fraud depending upon peculiar facts, see *Whiteside* v. *Hyman*, 10 Hun (N. Y.), 218; *Wheeler* v. *Randall*, 48 Ill. 182; *Collen* v. *Wright*, 8 El. & Bl. 647; *Richardson* v. *Dunn*, 8 C. B. (N. S.) 655; *Kendall* v. *Wilson*, 41 Vt. 567; *Pendergast* v. *Reed*, 29 Md. 398; *Boetge* v. *Landa*, 22 Tex. 105; *Platt* v. *Brown*, 30 Conn. 336. See Vol. 2, *Damages*.

§ 8. **Relief granted in equity.** Jurisdiction in a court of equity, by way of rescinding transactions on the ground of fraud, is exercised either for the purpose of canceling executory agreements, or of setting

aside executed agreements, deeds, or conveyances. In the former case, the equity of rescission is founded on the injustice of leaving a man exposed, it may be, for an indefinite time, to have a fraudulent instrument set up against him; in the latter case, the equity of rescission is founded on the injustice of permitting a man who has fraudulently appropriated the property of others, to benefit by the fruits of his iniquity. Kerr on Fraud and Mis. 332, 333. And see *Blair* v. *Bromley*, 2 Phillips, 354, 360; *Evans* v. *Bicknell*, 6 Ves. 174, 182.

Where a party has been induced to enter into a contract by false representations, as to a fact which is material, though believed at the time to be true by the party making them, it is cause for rescinding the contract. *May* v. *Snyder*, 22 Iowa, 525; *Bailey* v. *Jones*, 14 Ga. 384; *ante*, 436, art. 1, § 6. And contracts which relate to personal property may be rescinded, as well as those which relate to real property, Id.; *Bradbury* v. *Keas*, 5 J. J. Marsh. (Ky.) 446. And a contract may be rescinded for fraud relative to the title, notwithstanding there is a covenant of warranty. *Prout* v. *Roberts*, 32 Ala. 427; *English* v. *Benedict*, 25 Miss. 167.

But an application for the rescission of a contract presents a very different question from that presented on an application to compel a specific performance. Applications to rescind must abide the result, one way or the other, of the stern proof of fraud, for it will never be implied. In the absence of all proof of the *suggestio falsi* or *suppressio veri*, parties must abide by their contracts. *Maney* v. *Porter*, 3 Humph. (Tenn.) 347, 363; *Bailey* v. *Litten*, 52 Ala. 282. See *ante*, 445, art. 1, § 12. So, a party who would rescind a contract on the ground of fraud must offer to do so in a reasonable time after the fraud is discovered. *Cain* v. *Guthrie*, 8 Blackf. (Ind.) 409. See *ante*, 465, art. 4, § 5. An unexplained delay of over four years in disaffirming an agreement was held fatal to an action to rescind the agreement on the ground of fraud. *Krutz* v. *Craig*, 53 Ind. 561. And it is the general rule on a rescission, that the parties must be placed in *statu quo*, which is translated to mean, in the identical situation in which they were on entering into the contract. *Peters* v. *Gooch*, 4 Blackf. (Ind.) 515. And see *Bellamy* v. *Sabine* 2 Phillips, 425; *Pintard* v. *Martin*, 1 Sm. & M. (Miss.) Ch. 126; *Caldwell* v. *Caldwell*, 1 J. J. Marsh. (Ky.) 53; *Mixer's Case*, 4 De G. & J. 586. In other words, the contract must be rescinded *in toto*, if at all. It cannot be rescinded in part, and continued in existence in part (*Clarke* v. *Dickson*, El. Bl. & El. 148; *Clay* v. *Turner*, 3 Bibb [Ky.], 52; *Glassell* v. *Thomas*, 3 Leigh [Va.], 113; *Jopling* v. *Dooley*, 1 Yerg. [Tenn.] 289); unless it be a very special case, and one in which it is manifest

to the court that no possible injustice will be done by such a course *Bradley* v. *Bosley*, 1 Barb. Ch. 125. But the fact that the parties cannot be put precisely *in statu quo* as to the subfect-matter of the contract, will not preclude a decree for the rescission of a contract. If it would, an executed contract never could be rescinded by the decree of a court, for the parties never could be thus placed. *Gatling* v. *Newell*, 9 Ind. 572. And see *Freeman* v. *Reagan*, 26 Ark. 373.

If a person has been induced by the false representations of a third party to deal with another, he cannot have the transaction rescinded, if the other party to the transaction has not been party or privy to the false representation. *Pulsford* v. *Richards*, 17 Beav. 95; *Re Felgate's Case*, 2 De G., J. & S. 456; *Lee* v. *Vaughn*, 1 Bibb (Ky.), 235. He must seek redress in such case in an action at law for damages, against the party by whose false representations he has been induced to deal. *Woodman* v. *Freeman*, 25 Me. 531; *Ellis* v. *Coleman*, 25 Beav. 673; *Duranty's Case*, 26 id. 371; *Nicol's Case*, 3 De G. & J. 427. All that equity can do is to cause such third party to make good his assertion as far as is possible. *Bacon* v. *Bronson*, 7. Johns. Ch. 194; *Slim* v. *Croucher*, 1 De G., F. & J. 518; *Pollard* v *Rogers*, 4 Call. (Va.) 239; *Maunsell* v. *White*, 4 H. L. Cas. 1039; *Laver* v. *Fiedler*, 32 Beav. 1.

Nor will the court rescind a transaction without requiring the party who makes the application to restore the party against whom relief is sought, as far as possible, to that which shall be a just situation, as it respects the rights he held antecedently to the transaction. *King* v. *Savery*, 5 H. L. Cas. 627. The maxim applied is, that he who seeks equity must do equity. See Vol. 1, 155. *Ante*, 201, *Equity*. Instruments are, accordingly, either set aside on repayment of the actual consideration with interest thereon at a reasonable rate (*Gwynne* v. *Heaton*, 1 Bro. C. C. 1; *Miles* v. *Ervin*, 1 McCord's [S. C.] Ch. 524, 550), or are directed to stand as a security for the moneys actually advanced, with interest thereon at a reasonable rate (*Baker* v. *Bradley*, 7 De G., M. & G. 597; *Carter* v. *Palmer*, 8 Cl. & Fin. 657), or for what, upon investigation, shall be ascertained to be really due. *Purcell* v. *McNamara*, 14 Ves. 91; *Longmate* v. *Ledger*, 2 Giff. 157; *Smith* v. *Lansing*, 22 N. Y. (8 Smith) 520; Kerr on Fraud and Mis. 344. When a contract is rescinded at the suit of the purchaser, he is entitled to recover the purchase-money which he has paid, with the value of improvments erected by him in good faith, taxes paid, and interest on these several sums. *Baptiste* v. *Peters*, 51 Ala. 158. For a full discussion of this branch of the subject, see *post*, title *Rescission*.

An act or judgment may be set aside for fraud. *Green* v. *Beatty*,

1 N. J. L. 142; *Niles* v. *Anderson*, 6 Miss. 365; *Newton* v. *White*, 42 Iowa, 608; *Eslava* v. *Eslava*, 50 Ala. 32; *Smith* v. *Nelson*, 62 N. Y. 17 (Sick.) 286. And a court of equity will declare an instrument affected by fraud void on that ground, even though the fraud be such as might avoid the effect of the instrument, at law. *Monmouth, etc., Insurance Co.* v. *Hutchinson*, 21 N. J. Eq. 107. And see *Benzein* v. *Lenoir*, 1 Dev. (N. C.) Eq. 225. A sheriff's sale of land may be set aside for fraud, though previously ratified by an order of the court. *Knight* v. *Morris*, 4 Yeates (Pa.), 341. And where money has been paid in the acquisition of a tax title which is invalid because acquired under such circumstances of fraud or unfair dealing as would not warrant a court of equity in sustaining such title, the money so paid may be ordered to be reimbursed. *Hunt* v. *Rowland*, 28 Iowa, 349.

An appropriate remedy against fraud may, under the peculiar circumstances of the case, be by way of injunction. See *Henshaw* v. *Atkins*, 2 Root (Conn.), 7; *Reid* v. *Moulton*, 51 Ala. 255. And in restraining by injunction acts which are fraudulent, courts of equity exercise a very extensive jurisdiction. See *post*, title *Injunction*.

A court of equity acts *in personam*, and, when it has jurisdiction of the person, will afford relief against fraud, notwithstanding the property, in reference to which the fraud has been committed, is without the jurisdiction. *Briggs* v. *French*, 1 Sumn. (C. C.) 504. In such caces the relief will be adapted to its equity and justice, and, if the fraudulent grantee refuses to return the property, he may be charged with its value. *Stapler* v. *Hurt*, 16 Ala. 799. See *Gardner* v. *Ogden*, 22 N.Y. (8 Smith) 327; *Port Royal R. R. Co.* v. *Hammond*, 58 Ga. 523.

A fraudulent misrepresentation or concealment, in order to warrant the rescission of a contract or which will prevent a court of equity from aiding its enforcement, must relate to a material matter constituting an inducement to the contract, and respecting which the complaining party did not possess at hand the means of knowledge; and it must be a representation upon which he relied, and by which he was actually misled to his injury. See *ante*, 439, 440, art. 1, §§ 8, 9 and 10; *Winter* v. *Bandel*, 30 Ark. 362. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say, in impeachment of the contract, that he was deceived by the vendor's misrepresentations. *Slaughter* v. *Gerson*, 13 Wall. (U. S.) 379.

So, it is only in cases of fraud, unmixed with *negligence* upon the part of persons giving credit, that equity will interpose its powers to aid the vendor in the assertion of his legal rights to prevent the con-

summation of fraud. *Boone* v. *Collins*, 43 Ga. 278. Still, it is held to be no answer to the buyer's claim to be relieved of the contract, that by more vigilance he might have discovered the deception. *Upton* v. *Burnham*, 3 Biss. 431.

See *post*, title *Reformation of Instruments*, and *Specific Performance.*

CHAPTER LXXIII.

GIFTS.

TITLE I.

OF GIFTS IN GENERAL.

ARTICLE I.

OF GIFTS BETWEEN LIVING PERSONS.

Section 1. Definition and nature. A gift is the voluntary transfer of a thing without consideration. See *ante*, Vol. 2, p. 243. In the opinion of some of the writers on the civil law, every gift is a contract; but the English law does not consider a gift, strictly speaking, in the light of a contract, the latter being "an agreement upon *sufficient consideration*, to do or not to do a particular thing." 2 Bl. Comm. 442. See Vol. 1, 70. Yet every gift made perfect by delivery is an *executed* contract; for it is founded on the mutual consent of the parties, in reference to a right or interest passing between them. 2 Kent's Com. 438; *Bedell* v. *Carll*, 33 N. Y. (6 Tiff.) 581, 584; *Stewart* v. *Hidden*, 13 Minn. 43. And see 2 Schoul. Pers. Prop. 59, *et seq.*

Gifts between living persons, or gifts *inter vivos*, as they were distinguished in the civil law, have no reference to the future, and go into immediate and absolute effect. The donor renounces, and the donee immediately acquires, all title and interest in the subject of the gift. *Irish* v. *Nutting*, 47 Barb. 370, 383; *Faxon* v. *Durant*, 9 Metc. (Mass.) 339; *Allen* v. *Polereczky*, 31 Me. 338. While the gift *inter vivos* rests upon a mere executory contract to give, it has no legal validity. A mere agreement to give, without consideration, or, what is no better, for the consideration of love and affection, whether it be of goods and chattels, or, a chose in action, neither transfers the property to the donee, nor gives him a right, by suit, to compel a completion of the contract. *Irons* v. *Smallpiece*, 2 Barn. & Ald. 551; *Carpenter* v. *Dodge*, 20 Vt. 595; *Pope* v. *Dodson*, 58 Ill. 360; *Pennington* v. *Gittings*, 2 Gill & J. (Md.) 208, *Johnson* v. *Stevens*, 22 La.

Ann. 144. The gift must be absolute and irrevocable, to constitute a valid donation *inter vivos*. *Allen* v. *Polereczky*, 31 Me. 338; *Knott* v. *Hogan*, 4 Mete. (Ky.) 102; but an inchoate gift, by its very nature, leaves to the donor a *locus pœnitentiæ*, or right to change his mind and revoke or modify his gift. *Taylor* v. *Staples*, 8 R. I. 170; 5 Am. Rep. 536. One who makes a parol promise to pay money as a gift does not thereby bind himself, and he may revoke the promise at any time before completing the gift. *Pearson* v. *Pearson*, 7 Johns. 26. And a parol gift of a note from a father to a son was held not to be recoverable from the executors of the father. *Fink* v. *Cox*, 18 Johns. 145; *Pope* v. *Dodson*, 58 Ill. 360. And see *Pitts* v. *Mangum*, 2 Bailey (S. C.), 588; *Lee* v. *Luther*, 3 Woodb. & M. 519; *Starr* v. *Starr*, 9 Ohio St. 74.

§ 2. **What may be given.** Personal property of every kind, whether of a corporeal or incorporeal nature, may be the subject of transfer by gift. *Bogan* v. *Finlay*, 19 La. Ann. 94; *Mahon* v. *Baker*, 26 Penn. St. 519; *Stewart* v. *Hidden*, 13 Minn. 43; *Sanborn* v. *Goodhue*, 28 N. H. 48. But the subject of the gift must be certain, and it has, therefore, been held, that a gift of property not *in esse* at the time of the alleged transfer is wholly ineffectual. See *Butler* v. *Scofield*, 4 J. J. Marsh. (Ky.) 139; *Egerton* v. *Egerton*, 17 N. J. Eq. 419. So, there can be no direct and immediate gift of personalty to persons not *in esse*. *Hall* v. *Thomas*, 3 Strobh. (S. C.) 101.

In *Whiting* v. *Barrett*, 7 Lans. (N. Y.) 106, it was held that a recognition of the donee's ownership, by the donor, of property not present or *in esse* at the time of the gift, after the former has taken possession, renders the gift a perfect one, and completely transfers the title. And see *Hannon* v. *State*, 9 Gill (Md.), 440.

A father may, when acting in good faith, make a valid gift to his minor son of his time and future earnings, although insolvent at the time. *Atwood* v. *Holcomb*, 39 Conn. 270; 12 Am. Rep. 386.

§ 3. **What constitutes a gift.** The mutual consent and concurrent will of both parties are essential to a valid gift. On the part of the donor there must be a present intention to give, and a complete renunciation of right over the thing given, without power of revocation, and a full delivery of possession as a gift *inter vivos*. *Mims* v. *Ross*, 42 Ga. 121; *Hanson* v. *Millett*, 55 Me. 184; *Bond* v. *Bunting*, 78 Penn. St. 210. There must be an acceptance by the donee, and to entitle him to claim that the gift is irrevocable, and invests him with the right to the property, it must be shown that he has complied with the conditions upon which the gift was made. *Berry* v. *Berry*, 31 Iowa,

415. See *Doty* v. *Willson*, 47 N. Y. (2 Sick.) 580; *Halbert* v. *Halbert*, 21 Mo. 277.

A mere intention, or promise without consideration, to give, does not affect the title. *Brink* v. *Gould*, 7 Lans. (N. Y.) 425; S. C., 43 How. 289; *Shower* v. *Pilck*, 4 Exch. 478; *Kidder* v. *Kidder*, 33 Penn. St. 268; *Bourne* v. *Fosbrooke*, 18 C. B. (N. S.) 515; *Blasdel* v. *Locke*, 52 N. H. 238. And see *ante*, 487, § 1.

§ 4. **Delivery required.** Not only must there exist the intention to give, but it is essential to a valid parol gift that it go into effect at once and completely. *Spencer* v. *Vance*, 57 Mo. 427; *Reed* v. *Spaulding*, 42 N. H. 114. After the consummation of a gift by delivery, it is not necessary that the possession should remain with the donee. *Ivey* v. *Owens*, 28 Ala. 641. The subsequent possession by the donor may be explained, and will not divest the title transferred by the gift. Id.; *Easley* v. *Dye*, 14 Ala. 158; *Danley* v. *Rector*, 10 Ark. 211; *Ector* v. *Welch*, 29 Ga. 443. No gifts *inter vivos* will confer title unless there be a positive change of possession, and the donor is in no position to repossess himself of the subject-matter of the gift, or to recall the same. *Little* v. *Willets*, 55 Barb. 125; S. C., 37 How. 481; *Reeves* v. *Capper*, 5 Bing. N. C. 136; *Peeler* v. *Guilkey*, 27 Tex. 356; *Frisbie* v. *M' Carty*, 1 Stew. & P. (Ala.) 56. And see *Matter of Ward*, 51 How. (N. Y.) 316

Where a mother owns two heifers which are on her premises where she resides, and she tells her daughter who does not reside with her, that she might have either of the heifers which were not there present, and no other possession or delivery was made, this is not such a delivery or acceptance as will constitute a valid gift. *Brink* v. *Gould*, 7 Lans. 425; 43 How. 289.

Possession may, however, be delivered to the donee either actually or constructively, according to the nature of the subject-matter. *Carleton* v. *Lovejoy*, 54 Me. 445. It should be an actual delivery, so far as the subject is capable of it, and be the true and effectual way of obtaining the command and dominion of the subject. But if the thing be not capable of actual delivery, there must be some act equivalent to it. *Bond* v. *Bunting*, 78 Penn. St. 210; *Noble* v. *Smith*, 2 Johns. 52. Generally, corporeal chattels will pass by manual delivery. *Bogan* v. *Finley*, 19 La. Ann. 94. And where the chattels are numerous, as articles of furniture in a house, it will be sufficient for the donor to point them out generally, and allow the donee to take them. *Allen* v. *Cowan*, 23 N. Y. (9 Smith) 502. Nor is any precise form of words necessary to be observed at the time to constitute a good gift. *Doty* v. *Willson*, 47 N. Y. (2 Sick.) 580. Any expression of the donor's

willingness that the donee should take when the chattel was present, and in a situation to be taken by either party, is sufficient. *Caldwell* v. *Wilson*, 2 Spears (S. C.), 75; *Winter* v. *Winter*, 9 W. R. 747.

A delivery of the key of a chest or trunk, with words of gift of the chattel and its contents, is a good delivery to pass the property to the donee. *Marsh* v. *Fuller*, 18 N. H. 360; *Cooper* v. *Burr*, 45 Barb. 9. And where the donor and donee were living in intimate relations, occupying the same room in which was the subject of the gift, a declaration by the donor that he gave to the donee his trunk, and all that was in it, was held to constitute a valid gift of money in a savings bank, the pass book of the donor being in the trunk at the time. *Penfield* v. *Thayer*, 2 E. D. Smith (N. Y.), 305. See, also, *Allerton* v. *Lang*, 10 Bosw. (N. Y.) 362. Where a father procured a brand to be recorded in the name of his child, and with it branded certain cattle, under circumstances that should be intended to give them to the child, it was held that there was a sufficient delivery to consummate the gift. *Hillebrant* v. *Brewer*, 6 Tex. 45. So, a declaration of the intent to give, and an indorsement of the name of the donee on the back of a lottery ticket, with a re-affirmation of the gift after the ticket had drawn a prize, was held to be a valid gift of the prize to a child of the donor. *Grangiac* v. *Arden*, 10 Johns. 293. The question whether there was a delivery is one of fact for a jury or court. *Hunt* v. *Hunt*, 119 Mass. 474; *Thomas* v. *Degraffenreid*, 17 Ala. 602.

No particular ceremony is necessary to constitute a delivery, when there is already actual possession by the donee, accompanied by satisfactory evidence that the donor has relinquished all control of, and claim to the subject of the gift. Thus, if one borrow a chattel and the owner afterward says, "I make you a present of it," it is not necessary that the donee should surrender to the donor his actual possession, in order that the latter may re-deliver the chattel to him in execution of the gift. *Tenbrook* v. *Brown*, 17 Ind. 410; *Winter* v. *Winter*, 9 W. R. 747; *Wing* v. *Merchant*, 57 Me. 383. The actual transfer of possession to the donee, whenever and however accomplished, if supplemented by plenary evidence of an intentional release to the donee, on the part of the donor, *per verba de presenti*, of any and all right or claim ever to resume the possession, or to deprive the donee of it, will make a complete gift *inter vivos*. And it matters not whether the change of possession takes place before or after, or at the time of the utterance of the words importing a gift, if there is a manifest design on the part of the donor that the donee should thereafter hold such possession absolutely, as of his own property, thenceforward, the possession and the right are concurrent in the same per-

son, and the gift is perfect and irrevocable. Id.; *Gillespie* v. *Burleson*, 28 Ala. 551. But see *Shower* v. *Pilck*, 4 Exch. 478.

If the thing given be a *chose in action*, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed. 2 Kent's Com. 439; *Bond* v. *Bunting*, 78 Penn. St. 210; *Phipps* v. *Hope*, 16 Ohio St. 586. See *Johnson* v. *Spies*, 5 Hun, 468. A mere promise to execute an assignment, which is never performed, cannot be a gift by assignment. *Picot* v. *Sanderson*, 1 Dev. (N. C.) 309. See, also, *Egerton* v. *Egerton*, 17 N. J. Eq. 419; *Payne* v. *Powell*, 5 Bush (Ky.), 248; *Pennington* v. *Gittings*, 2 Gill. & J. (Md.) 208. And, since the debt represented by a note is the principal thing in a mortgage transaction, the delivery as a gift of a mortgage duly assigned to the donee, without a delivery of the note secured by it, does not pass the title to the debt. *Wilson* v. *Carpenter*, 17 Wis. 512. But upon the principle that a seal imports a consideration, a voluntary bond may be upheld, both in equity and at law, as a gift of the money. *Sherk* v. *Endress*, 3 Watts & Serg. 256; *Mack's Appeal*, 68 Penn. St. 231; *Barton* v. *Gainer*, 3 H. & N. 387.

So it is well settled by the modern authorities, that choses in action not negotiable, and negotiable paper not indorsed, may be the subject of a gift, and that a delivery which vests in the donee the equitable title is sufficient without a complete transfer of the legal title. *Jones* v. *Deyer*, 16 Ala. 221. In this respect a title by gift is not distinguishable from a title by purchase for a valuable consideration, and, when the claims of creditors do not interfere to affect its validity, such a title will be recognized and protected in the same manner and to the same extent as a title by sale. The delivery of a note, bond, or certificate of stock to a third person, with the intention to vest the right of property in the donee. See *Dunbar* v. *Woodcock*, 10 Leigh (Va.), 628; *M'Nulty* v. *Cooper*, 3 Gill & J. (Md.) 214; *Grover* v. *Grover*, 24 Pick. 261; *Stewart* v. *Hidden*, 13 Minn. 43; or the execution of an instrument declaring an intention to make a present gift to him, or a declaration of trust in his favor, is enough to constitute a gift which a court of equity wlll uphold and enforce. See *Fulton* v. *Fulton*, 48 Barb. 581; *Richardson* v. *Richardson*, L. R., 3 Eq. 686; *Morgan* v. *Malleson*, L. R., 10 id. 475; *Moore* v. *Moore*, L. R., 18 id. 474; 10 Eng. R. 788; *Kekewich* v. *Manning*, 1 DeG. M & G. 176; 2 Lead. Cas. Eq. (4th Am. ed.) 1646. On the principle of equitable assignment above stated it has been held that a delivery to a donee of a savings-bank book, containing entries of deposits to the credit of the donor, with the intention to give to the donee the deposits represented by the book, is a good delivery to constitute a complete gift of such deposits.

Camp's Appeal, 36 Conn. 88. See, also, *Gardner* v. *Merritt*, 32 Md.78; 3 Am. Rep. 115; *Howard* v. *Savings-Bank*, 40 Vt. 597; *Blasdel* v. *Locke*, 52 N. H. 238; *Minor* v. *Rodgers*, 40 Conn. 512; 16 Am. Rep. 69; *Champney* v. *Blanchard*, 39 N. Y. (12 Tiff.) 111; *Hill* v. *Stevenson*, 63 Me. 364; 18 Am. Rep. 231. So, a valid gift may be made of a debt due from the donee to the donor, and such gift may be consummated by a delivery to the former by the latter of any evidence of the debt existing; and if none, then by a delivery of a receipt in full thereof. *Gray* v. *Barton*, 55 N. Y. 10 (Sick.) 68; 14 Am. Rep. 181. See *Ferry* v. *Stephens*, 66 N. Y. (21 Sick.) 321. So, a gift of railroad shares has been sustained, although assigned in blank and never recorded on the corporation books during the life-time of the donor. *Stone* v. *Hackett*, 12 Gray, 227. And in a New York case it was held that the donee of a bond and mortgage acquires a legal as well as an equitable title to the securities, by mere delivery of the original papers, without any writing *Hackney* v. *Vrooman*, 62 Barb. 650, 669. But see *Johnson* v. *Spies*, 5 Hun (N. Y.), 468; *Wilson* v. *Carpenter*, 17 Wis. 512; *ante*, 491.

Indorsements of part payments on a mortgage by the mortgagee, with the intention of making the amounts expressed a gift to the mortgagor, were held to be an extinguishment or forgiving of the mortgage debt to that extent. Where, as in this case, the gift is made to the debtor himself, and does not admit of a technical delivery, the intention of the donor will not be defeated on that ground. *Green* v. *Langdon*, 28 Mich. 221.

In Louisiana, delivery of a check for money in bank is a good gift of the amount. But it is otherwise of a promissory note. *Succession of De Pouilly*, 22 La. Ann. 97.

It is not essential to a valid gift that the delivery be directly to the donee, but it may be made to a third person in trust for the donee. *Minchin* v. *Merrill*, 2 Edw. Ch. 333; *Dresser* v. *Dresser*, 46 Me. 48; *Hill* v. *Stevenson*, 63 id. 364; 18 Am. Rep. 231; *Gardner* v. *Merritt*, 32 Md. 78; 3 Am. Rep. 115. Or, the donor may even convert himself into a trustee for the donee by an apt declaration to that effect. *Taylor* v. *Kelly*, 5 Hun (N. Y.), 115; *Minor* v. *Rodgers*, 40 Conn. 512; 16 Am. Rep. 69. And, in general, where property is delivered to a third person by the donor, with authority to deliver it to the donee, this depository, until the authority is executed by an actual delivery to and acceptance by the donee, is the agent of the donor, who may revoke the authority and take back the gift. *People* v. *Johnson*, 14 Ill. 342; *Sessions* v. *Moseley*, 4 Cush. 87. And, therefore, if the delivery do not take place in the donor's life-time, the authority is revoked by his death, the property does not pass, but remains in the

donor, and goes to his executor or administrator. Id.; *Allen* v. *Pole reczky*, 31 Me. 338; *Craig* v. *Kittredge*, 46 N. H. 57. Nor is a gift *inter vivos* sustainable which contemplates a postponement of delivery by the agent or trustee until the donor's death. See *Cummings* v. *Bramhall*, 120 Mass. 552; *Bigelow* v. *Paton*, 4 Mich. 170. A gift of personalty made in this way can only be sustained, if at all, as a gift *causa mortis*, or as a testamentary disposition, with all the formalities of a will. *Busby* v. *Byrd*, 4 Rich. (S. C.) Eq. 9; *Phipps* v. *Hope*, 16 Ohio St. 586; *Craig* v. *Kittredge*, 46 N. H. 57; 2 Schoul. on Pers. Prop. 82. But see *Wyble* v. *McPheters*, 52 Ind. 393. Where an agent or trustee is already in charge of certain property for the owner, and is required by the latter to deliver it to the donee, the gift becomes complete upon a strict compliance with the donor's instructions, but not otherwise. *Berry* v. *Berry*, 31 Iowa, 415; *Picot* v. *Sanderson*, 1 Dev. (N. C.) 309. Until the agent has complied with the order, title continues in the donor, and the *locus penitentiæ* remains. Id.; *Cotteen* v. *Missing*, 1 Madd. Ch. 176.

§ 5. **Of the validity of gifts.** In general, a gift of personal property, accompanied by delivery, is valid and irrevocable, unless it be prejudicial to creditors, or the donor was under legal incapacity, or was circumvented by fraud. *Sanborn* v. *Goodhue*, 28 N. H. 48. But a gift of stolen goods, or property in which the giver has no transmissible title, is invalid as it respects the true owner. See *Hall* v. *Robinson*, 2 N. Y. (2 Comst.) 293; *Tome* v. *Dubois*, 6 Wall. 548; *ante*, Vol. 2, p. 236. And it has been stated as a general principle that a party who claims title to property by deed of gift is a volunteer; and a subsequent purchaser for a valuable consideration, without notice of the voluntary conveyance, is preferred in law to the volunteer. *Black* v. *Thornton*, 31 Ga. 641. But, if he had notice before he purchased, the volunteer will be preferred over him. Id. And see, also, *Moultrie* v. *Jennings*, 2 McMull. (S. C.) 508; *Green* v. *Kornegay*, 4 Jones' (N. C.) L. 66; *Anderson* v. *Green*, 7 J. J. Marsh. (Ky.) 448; *Aiken* v. *Bruen*, 21 Ind. 137; *Gregory* v. *Haworth*, 25 Cal. 653.

But the most important exception to the validity of executed gifts of chattels is that made in favor of the donor's creditors, who seek to set aside transactions of this kind upon the ground of fraud. And under the general head of fraudulent conveyances are classed all conveyances, whether of real or personal property, whose object, tendency, or effect is to defraud one of his legal rights. See 2 Schoul on Pers. Prop. 101. The English legislature interfered at an early period in favor of the donor's creditors, by the enactment of the statutes of 50 Edw. III, ch. 6, and 3 Hen. VII, ch. 4, which declare void all fraudulent gifts of

goods and chattels made in trust for the donor, and with intent to defraud creditors. These statutes were followed by that of 13 Eliz., ch. 5, by which gifts of goods and chattels, as well as of lands, by writing or otherwise, made with intent to delay, hinder, and defraud creditors, were rendered void, as against the person to whom such fraud would be prejudicial. But the statute excepted from its operation estates or interests in lands or chattels conveyed or assured *bona fide* and upon good consideration, without notice of any fraud or collusion. See 2 Kent's Com. 440. This statute has in substance been re-enacted in most of the United States, and its principle doubtless prevails in all the States; for its provisions are considered as only declaratory of the principles of the common law. *Cadogan* v. *Kennett*, Cowp. 434; *Clements* v. *Moore*, 6 Wall. 299.

A man who seduces a female, and then induces her to submit to an operation for abortion, which results in her serious sickness and suffering; and he afterward promises, as a return for her suffering, to furnish her money to buy a house, which he does, there is no resulting trust in the property to him, nor can his creditors reach it. *Gisaf* v. *Neval*, 81 Penn. St. 354.

For a full discussion of this branch of the subject, see titles *Fraud; Fraudulent Conveyances, etc.*

§ 6. **Proof of gift.** The question of gift or no gift is generally left to the jury to be determined according to the evidence presented; and a person claiming property as a gift will be held to reasonably strict proof of the gift. *Hunt* v. *Hunt*, 119 Mass. 474; *Boudreau* v. *Boudreau*, 45 Ill. 480; *Thomas* v. *Degraffenreid*, 17 Ala. 602. And see *Grey* v. *Grey*, 47 N. Y. (2 Sick.) 555. And although the declarations of a donor are admissible in evidence to prove a gift of personal property, yet they are insufficient in themselves to establish the gift. *Gill* v. *Strozier*, 32 Ga. 688; *Hackney* v. *Vrooman*, 62 Barb. 650.

But where a man expresses an intention to give a thing, the subsequent possession of the thing by the donee is sufficient to authorize the presumption that the gift was actually made. *McCluney* v. *Lockhart*, 1 Bailey (S. C.), 117; *Rhodes* v. *Childs*, 64 Penn. St. 18. And the donor's subsequent admission, expressions and general conduct may be taken into consideration as corroborative evidence. *Burney* v. *Ball*, 24 Ga. 505; *Dean* v. *Dean*, 43 Vt. 337. So, among circumstances which may be regarded as favoring a transfer as a gift, are, the near relationship of the parties (*Hepworth* v. *Hepworth*, L. R., 11 Eq. 10); the strong affection of the donor for the donee (*Rhodes* v. *Childs*, 64 Penn. St. 18); the exercise of dominion over the property by the donee with the plain assent of the donor (*Bland* v. *Maccul-*

loch, 9 W. R. 65); or suffering the property to remain for a long time in the possession of another, without demanding its return or an equivalent therefor. *M'Donald* v. *Crockett*, 2 McCord's (S. C.) Ch. 130; *Carter* v. *Buchanan*, 9 Ga. 539. And when a son or daughter marries, and is about setting up a separate establishment, and the father provides the necessary outfit for housekeeping, and transfers the possession to the son or daughter without qualification or reservation made at the time, a presumption arises that the transaction is a gift, prompted by natural affection of the donor, and this presumption should prevail, until rebutted by other evidence showing that the donor and donee did not consider the transaction as a gift. *Nichols* v. *Edwards*, 16 Pick. 62; *Betts* v. *Francis*, 30 N. J. Law, 152. In *Rich* v. *Mobley*, 33 Ga. 85, the presumption in favor of a gift made by a father to his daughter, on her marriage, was held to be completely overcome and destroyed by the declarations of the son-in-law, that the property was loaned and not given.

A gift obtained by a person standing in a confidential relation to the donor is *prima facie* void; and the burden is thrown on the donee to establish, to the satisfaction of the court, that such gift was the free, voluntary, unbiased act of the donor. *Todd* v. *Grove*, 33 Md. 188. And see *Yosti* v. *Laughran*, 49 Mo. 594; *Prickett* v. *Prickett*, 20 N. J. Eq. 478. Such are gifts obtained by attorney from client, spiritual adviser from advisee, trustee from *cestui que trust*, parent from child, and guardian from ward. *Garvin* v. *Williams*, 44 Mo. 465; *Wright* v. *Vanderplank*, 2 Kay & J. 1; S. C., 8 DeG., M.& G. 133.

If a gift be made by deed, parol evidence is inadmissible to give it a different construction from that apparent on the face of the instrument. *Pooser* v. *Tyler*, 1 McCord's (S. C.) Ch. 18. And where a gift is alleged to be evidenced by a deed, which is not produced, but an attempt is made to prove the gift by parol evidence, the withholding of the deed casts suspicion over the entire transaction. *Blakey* v. *Blakey*, 9 Ala. 391.

It is a well-settled rule, that no mere parol declaration will transform a debt into a gift. *Strong* v. *Bird*, L. R., 18 Eq. 315; 9 Eng. R. 827; *Brinckerhoff* v. *Lawrence*, 2 Sandf. Ch. 400. And see *Henderson* v. *Henderson*, 21 Mo. 379; *Roland* v. *Schrack*, 29 Penn. St. 125. But where one has delivered personal property under circumstances rendering it uncertain whether it was intended as a loan or a gift, his distinct declaration made subsequently that he meant it as a gift, is admissible for the purpose of resolving the doubt. *Doty* v. *Willson*, 47 N. Y (2 Sick.) 580. And see *Gray* v. *Barton*, 55 N. Y. (10 Sick.) 68; *Strong* v. *Bird*, L. R., 18 Eq. 315; 9 Eng. R. 827.

A party who claims title to property by gift is not called upon, in order to sustain the claim, to show affirmatively, and with minuteness, the circumstances under which the alleged gift was made. He establishes a *prima facie* case when he shows that the disposition has been attended by all the requisites which the common law prescribes to give it validity. Certainly, he is not required to prove affirmatively that the donor was of sound disposing mind and memory when he made the gift, and that the delivery of the subject was his free and voluntary act. *Bedell* v. *Carll*, 33 N. Y. (6 Tiff.) 581.

§ 7. **Presumptions as to gifts.** Although the law does not presume a gift (*Grey* v. *Grey*, 47 N. Y. [2 Sick.] 552, 555), yet, as seen in the preceding section, there may be circumstances attending the transfer of property from which a presumption will arise that the transaction is a gift. See, also, *Henry* v. *Harbison*, 23 Ark. 25, and *post*, § 9.

§ 8. **Donor's intention.** Mere words signifying an intent to give, unaccompanied by a delivery of the property, are insufficient. *Spencer* v. *Vance*, 57 Mo. 427; *ante*, 489, § 4. Thus, when a father pointed out a colt to his daughter, saying, "That is your property; I give it to you," but retained the possession, it was held that no title passed to her. *Brewer* v. *Harvy*, 72 N. C. 176. And see *Trough's Estate*, 75 Penn. St. 115. So, the mere delivery of the goods will not, in general, pass the title thereto; but there must be an *intention* to give accompanying the *act of delivery* in order to consummate the gift, or the circumstances authorizing the delivery of the goods must be such as ordinarily accompany a gift, inducing the donee to believe that a gift was intended. *Betts* v. *Francis*, 1 Vroom (N. J. L.) 152. If that be the case, the title to the goods will pass, although it may not be the secret intention of the donor to make a gift. Id. If the circumstances clearly evince the intention, it is sufficient; and if these are equivocal, an explicit declaration afterward of that intention is competent. *Doty* v. *Willson*, 47 N. Y. (2 Sick.) 580. See, also, *Olds* v. *Powell*, 7 Ala. 653; *Morisey* v. *Bunting*, 1 Dev. (N. C.) L. 3. So, it is held that full proof of a gift and delivery of possession makes inadmissible the subsequent declarations of the donor that a gift was not intended; and the reservation of a right to borrow, or to receive something like hire, if the donor should stand in need, is a condition subsequent, which, if it operates at all on the gift, tends to perfect it. *McKane* v. *Bonner*, 1 Bailey (S. C.), 113. And see *High* v. *Stainback*, 1 Stew. (Ala.) 24

§ 9. **Acceptance of gift.** Acts and conduct on the part of the donee, consistent with assuming the control and dominion of the prop-

erty, will sufficiently prove acceptance by him, without any formal expression of his disposition. And not only so, but if the donee be of mature years, he will be presumed to have accepted the gift, if it be for his advantage, unless the contrary appears. *Howard* v. *Savings Bank*, 40 Vt. 597; *Goss* v. *Singleton*, 2 Head, 67; *DeLevillain* v. *Evans*, 39 Cal. 120. And in the case of a minor who is presumed in law to be incapable of exercising a sound discretion over his affairs, and is, therefore, not bound by his contracts, unless in exceptional cases, there is the greater reason for presuming that he has accepted what is for his advantage. Id. In other words, if the gift is for his advantage, the law accepts it for him and will hold the donor bound; but, if not for his advantage, the law will repudiate it at the instance of the minor, even though he may in terms have accepted it. Id. And such is also the rule of the civil law. See *Donner* v. *Palmer*, 31 Cal. 500; *Howard* v. *Copley*, 10 La. Ann. 504; *Barnebe* v. *Suaer*, 18 id. 148.

§ 10. **Gifts between parent and child.** In the absence of qualifying or contrary evidence, a delivery of personal property by a parent to a child, on or after marriage, will be regarded as a gift or advancement. *Whitfield* v. *Whitfield*, 40 Miss. 352. And see *Creed* v. *Lancaster Bank*, 1 Ohio St. 1. But this presumption may be rebutted by proof that a less estate was intended, see *ante*, 494, § 6, and the acts and declarations of the donor, at or about the time, are admissible as evidence in proof of such fact. *Caldwell* v. *Pickens*, 39 Ala. 514. See *Stevenson* v. *Martin*, 11 Bush (Ky.), 485.

Where a father placed personal property in the possession of his son, about the time he arrived at age, and suffered him to continue such possession uncontrolled for a considerable time, using it as his own, it was held, that a gift would be implied, which could only be rebutted by express evidence of a mere loan. *Hollowell* v. *Skinner*, 4 Ired. (N. C.) L. 165. See, also, *Young* v. *Glendenning*, 6 Watts (Penn.), 509; *Pierson* v. *Heisey*, 19 Iowa, 114. So where the donee of personal property was under the age of twenty-one-years, and lived with his father, the donor, the possession by the donor of the gift was held to be consistent with the donee's right, and was not even presumptive evidence of fraud. *Sewall* v. *Glidden*, 1 Ala. 52. See *VanDeusen* v. *Rowley*, 8 N. Y. (4 Seld.) 358; *Rector* v. *Danley*, 14 Ark. 304. A deed of gift by a father to his children, of "all the estate which he owns at the date of the deed, or should own at his death," does not pass to his children money of which he died possessed, without an actual delivery of the money. *Butler* v. *Scofield*, 4 J. J. Marsh. (Ky.) 139.

Where a father gave a son a calf, which the son kept two years and a half at his own expense, when it was attached on the father's debt con-

tracted before the gift, it was held, that after the creditor had slept on his rights thus long, and the son had enhanced the value of the gift to such an extent, the court would not apply the principle of law that a man must be just before he is generous. *Allen* v. *Knowlton*, 47 Vt. 512.

But a promissory note not under seal, given in pursuance of an agreement between a father and his minor daughter, that he would pay her for her services during minority when she should become of age, although given when the father was perfectly solvent and free from debt, was held to be inoperative as a gift as well as a contract, even against subsequent creditors. *Cowen's Estate*, 3 Pittsb. (Penn.) 471. See *Pope* v. *Dodson*, 58 Ill. 360.

Where a gift is made by a child to a parent before the parental authority and dominion have terminated, it is to be presumed to be made under parental influence, and therefore invalid; and the burden of proof lies on the parent to rebut this presumption, by showing that the child had independent advice, or was otherwise placed in a position to exercise an independent judgment as to the gift. *Wright* v. *Vanderplank*, 8 DeG., M. & G. 133; S. C., 2 Kay & J. 1.

§ 11. **Gifts between husband and wife.** At common law there cannot be a gift of chattels *inter vivos*, from the husband to the wife during coverture; for, being but one person in law, she cannot take independently of him. *Neufville* v. *Thomson*, 3 Edw. Ch. 92. But equity has always sustained such gifts, whether made with or without the intervention of a trustee, when the claims of creditors were not affected, and when the gifts were clearly proved. If in fact made, equity will sustain and enforce the gift. *Mews* v. *Mews*, 15 Beav. 529; *Deming* v. *Williams*, 26 Conn. 226; *Jennings* v. *Davis*, 31 id. 138; *Shuttleworth* v. *Winter*, 55 N. Y. (10 Sick.) 624; *Mack* v. *Mack*, 5 N. Y. Sup. (T. & C.) 528; S. C., 3 Hun, 323; *Draper* v. *Jackson*, 16 Mass. 480. And it has been held, that a deed of gift from husband to wife, if founded on a good consideration, will be sustained even if it is not recorded. *Woodson* v. *McClelland*, 4 Mo. 495.

Where personal property, consisting of articles of furniture, is in the possession of a husband and wife, and is used in rooms occupied by them, the possession is, presumptively, that of the husband. This presumption may, however, be rebutted by proof of conversations between them, in which the husband admitted that the property belonged to his wife, and that he stood silently by when she asserted title thereto. *Turner* v. *Brown*, 6 Hun (N. Y.), 331.

In order to constitute a gift by a husband to his wife, the husband

must use words which clearly indicate that he has divested himself of all beneficial interest in the subject-matter of the gift. Such words need not, however, be technical, and may be spoken either at the time of the gift or afterward. *Grant* v. *Grant*, 34 Beav. 623; S. C., 11 Jur. (N. S.) 787.

A wife, though living apart from her husband, cannot lawfully dispose by gift (even accompanied by actual delivery of possession) of chattels acquired by her during the coverture. *Bourne* v. *Fosbrooke*, 18 C. B. (N. S.) 515. But, in an action by the donee against a wrongdoer, for the conversion of chattels so given, it is not competent for him to set up the title of the husband. Id.

§ 12. **Gifts in view of marriage.** See the cases collected on this branch of the subject, *ante*, 494, § 6. Marriage is the highest consideration known in law; a gift, therefore, in consideration of marriage is held good, even against creditors, unless made with a fraudulent intention. *Johnston* v. *Dilliard*, 1 Bay. (S. C.) 232. But the evidence to sustain a parol gift by a father to his daughter, on her marriage, must be clear and cogent. *Collins* v. *Lofftus*, 10 Leigh (Va.), 5.

A parent is a competent witness to prove a gift by himself to his child. *Smith* v. *Littlejohn*, 2 McCord (S. C.), 362.

§ 13. **Of deeds of gift.** Deeds of gift were formerly in common use in the Southern States as a mode of transfer of the title of property in slaves. And such deeds are still sometimes to be found, but are of infrequent occurrence. Delivery is essential to the validity of a *parol* gift of a chattel, and without delivery and a transfer of the possession, the title does not pass to the donee. *Ante*, 489, § 4. But a gift by deed is valid at the common law, though there be no actual delivery of the thing given. The execution and delivery of the deed are considered to be equivalent to the delivery of the subject of the gift. *Carr* v. *Burdiss*, 1 Cr. M. & R. 782, 788; *Irons* v. *Smallpiece*, 2 B. & Ald. 552; *Gordon* v. *Wilson*, 4 Jones' (N. C.) L. 64; *McEwen* v. *Troost*, 1 Sneed (Tenn.), 186; *Foster* v. *Mitchell*, 15 Ala. 571. Not, however, because the delivery of the deed is a symbolical delivery of the property, but upon the principle of estoppel. See *Connor* v. *Trawick*, 37 Ala. 289; *Mc Willie* v. *Van Vacter*, 35 Miss. 428; *Baxter* v. *Bailey*, 8 B. Monr. (Ky.) 336; 2 Schoul. Pers. Prop. 84.

The mere execution of a deed of gift which has not been delivered, is ineffectual to establish a donee's title (*Martin* v. *Ramsey*, 5 Humph. [Tenn.] 349; *Payne* v. *Powell*, 5 Bush [Ky.], 248); and any instrument must be invalid as a deed of gift, which purports to convey a present interest, to take effect, in possession, upon some

future event, where possession is not delivered, but is expressly reserved to the donor. *Mc Willie* v. *Van Vacter*, 35 Miss. 428. See *Abbot* v. *Williams*, 2 Brev. (S. C.) 38.

Personal property may be limited over in any way by which it can be transmitted from one person to another. And, therefore, in a gift of personal property, the donor may, by writing not under seal, or verbally, create a limitation over either by way of trust or as a direct gift; and such writing is admissible evidence against those claiming under the donee. *Brummet* v. *Barber*, 2 Hill (S. C.), 543.

§ 14. **Recording deeds of gift**. The registration of deeds of gift is a requisite formality prescribed by statute in some of the States. But such a deed has been held good as between the parties, although not proved and recorded as the statute prescribes. *Perry* v. *Graham*, 18 Ala. 822. And see *Inlow* v. *Commonwealth*, 6 T. B. Monr. (Ky.) 72; *Anderson* v. *Dunn*, 19 Ark. 650; *Hancock* v. *Hovey*, 1 Tayl. (N. C.) 104.

Under the Civil Code of Louisiana, donations *inter vivos* of incorporeal things, including bills and notes, are of no effect, notwithstanding a manual delivery of the muniment of title, unless formally transferred in presence of a notary public and two witnesses. *Succession of DePouilly*, 22 La. Ann. 97. But the giving of a check for money is subject to no other formality than that of delivery. Id.

§ 15. **Revocation of gift.** A gift fully performed, being an executed contract (see *ante*, 487, § 1), neither party can revoke it without the consent of the other. 2 Bl. Com. 441; 2 Kent's Com. 440. Thus it has been said, "a gift is no more revocable in its nature than a conveyance or transfer of property in other modes. The possession being given with the intent to part with the property in the thing, the right of dominion for all purposes goes with it." *Parker* v. *Ricks*, 8 Jones' (N. C.) L. 447. The rule is likewise the same in equity,—that a voluntary gift or conveyance of property, whether made directly to the beneficiary or in trust, when fully completed and executed, will be regarded as valid and its provisions will be enforced and carried into effect against all persons except creditors or *bona fide* purchasers without notice. *Ellison* v. *Ellison*, 6 Ves. 656; *Kekewich* v. *Manning*, 1 De G., M. & G. 176; *Sanborn* v. *Goodhue*, 8 Fost. (N. H.) 48; *Stone* v. *Hackett*, 12 Gray, 227. And as a gift is not revocable *in toto*, after it has fully taken effect, neither can it be revoked in part. *Minor* v. *Rogers*, 40 Conn. 512; S. C., 16 Am. Rep. 69.

In accordance with the doctrine above stated, it has been held that an executed gift, *inter vivos*, is not annulled by the donor's subsequent

declarations that a gift was not intended (*M'Kane* v. *Bonner*, 1 Bailey [S. C.], 113); nor by a will made subsequently by the donor, purporting to dispose otherwise of the same property. *Marston* v. *Marston*, 21 N. H. 491. So, property already bequeathed in the donor's will may be otherwise irrevocably disposed of by gift, since a will may be revoked at pleasure during the life-time of the testator. *Parker* v. *Ricks*, 8 Jones' (N. C.) L. 447.

As one party to a gift completely executed cannot revoke it without the consent of the other party thereto, neither can his legal representatives, after his death, intermeddle with the gift, unless, perhaps, where the donor died insolvent. *Gilleland* v. *Failing*, 5 Denio, 308; *Jewell* v. *Porter*, 31 N. H. 34; *Stone* v. *Hackett*, 12 Gray, 227. The thing given constitutes no part of the deceased donor's estate. Id. And where a deposit has been made with a banker, in such a way as to constitute a completed gift, and both the donor and donee afterward die, the representatives of the donee, rather than those of the donor, are entitled to the deposit. *Howard* v. *Savings Bank*, 40 Vt. 597. See, also, *Dresser* v. *Dresser*, 46 Me. 48; *Bates* v. *Kempton*, 7 Gray, 382.

The mental incapacity of a party to a gift may be a good reason for declaring the gift null and void. See *Van Deusen* v. *Rowley*, 8 N. Y. (4 Seld.) 358; *Crum* v. *Thornley*, 47 Ill. 192. And a gift may be set aside, on the ground of fraud, force, or palpable error, at the instance of the party entrapped into, or injured by, the transaction. *Samuel* v. *Marshall*, 3 Leigh (Va.), 567; *Todd* v. *Grove*, 33 Md. 188. And the parties may, of course, rescind or modify the gift by mutual consent, provided all whose rights have once vested concur in the change. See *Plummer* v. *Rundlett*, 42 Me. 365.

Gifts from parents to their children constitute no exception to the general rule which excludes the donor's right to revoke at pleasure. And if a father make to a minor son an absolute gift of an article of dress or ornament, as for instance, a watch, he cannot afterward, without the son's consent, reclaim the gift. *Smith* v. *Smith*, 7 Carr. & P. 401. And see *Pierson* v. *Heisey*, 19 Iowa, 114. So, where a voluntary conveyance by a father to his son was destroyed by the father after it had been delivered, but before registration, the court ordered a new conveyance to the son. *Tolar* v. *Tolar*, 1 Dev. (N. C.) Eq. 456. See *Johnson* v. *Stevens*, 22 La. Ann. 144; *Cranz* v. *Kroger*, 22 Ill. 74.

ARTICLE II.

OF GIFTS IN VIEW OF DEATH.

Section 1. In general. Gifts *causa mortis* are not favored in law. They are said to be a fruitful source of litigation, often bitter, protracted, and expensive. They lack all those formalities and safeguards which the law throws around wills, and create a strong temptation to the commission of fraud and perjury. See *Hatch* v. *Atkinson*, 56 Me. 324, 326; *Delmotte* v. *Taylor*, 1 Redf. (N. Y.) 417. But see *Ellis* v. *Secor*, 31 Mich. 185; 18 Am. Rep. 178. To constitute a valid gift *causa mortis* three things are requisite: 1. It must be made with a view to the donor's death from present illness or from external and apprehended peril. 2. The donor must die of that ailment or peril. 3. There must be a delivery. *Grymes* v. *Hone*, 49 N. Y. (4 Sick.) 17; S. C., 10 Am. Rep. 313; *Raymond* v. *Sellick*, 10 Conn. 484; *Grattan* v. *Appleton*, 3 Story, 755; *Thompson* v. *Thompson*, 12 Tex. 327; *Dole* v. *Lincoln*, 31 Me. 422; *Michener* v. *Dale*, 23 Penn. St. 59; 2 Kent's Com. 444. One distinction between a gift *causa mortis* and a gift *inter vivos* is, that in the former the delivery is conditional, to take effect at death unless revoked, and in the latter the delivery is absolute. In the former the title does not vest until death, while in the latter it vests immediately. *Doty* v. *Willson*, 47 N. Y. (2 Sick.) 580; *Johnson* v. *Spies*, 5 Hun (N. Y.), 468; *Sessions* v. *Moseley*, 4 Cush. 92.

A *donatio mortis causa* has the substantial qualities of a legacy in being ambulatory and revocable during the life of the donor. *Jones* v. *Brown*, 34 N. H. 439; *Rhodes* v. *Childs*, 64 Penn. St. 18; *Bunn* v. *Markham*, 7 Taunt. 224. It is subject to the debts of the deceased, and, in England, has been declared by statute to be liable to legacy duties. Id.; *Bloomer* v. *Bloomer*, 2 Bradf. (N. Y.) 339. But it differs from a legacy in that it is not essential that it should be confirmed by any action, either of the probate court or by the assent of the executor. *Ward* v. *Turner*, 2 Ves. Sen. 431, 439; *Lawson* v. *Lawson*, 1 P. Wms. 441.

§ 2. **What may be given.** Although the property which is the subject of a gift *causa mortis* be the principal part of the donor's property (*Michener* v. *Dale*, 23 Penn. St. 59), or even the whole of it (*Meach* v. *Meach*, 24 Vt. 591), yet the gift is not on that account invalid. Id. But see *Headley* v. *Kirby*, 18 Penn. St. 326; *Marshall* v. *Berry*, 13 Allen, 43. A gift *causa mortis* is, however, confined to personal property, and cannot extend to real estate. *Meach* v. *Meach*, 24 Vt. 591. It embraces, of course, every species of corporeal personal property (see

Michener v. *Dale*, 23 Penn. St. 59); and since the equitable doctrine has prevailed that *choses in action* can be assigned by delivery, they are placed with all other chattels as subject to gift, and the same rules have been enforced. *Ellis* v. *Secor*, 31 Mich. 185; S. C., 18 Am. Rep. 178. Thus it is well settled both by the English and the American authorities, that choses in action, such as bonds and mortgages, and promissory notes not indorsed, may be well transferred by delivery only, as a *donatio causa mortis*. *Duffield* v. *Elwes*, 1 Bligh (N. S.), 497; *Parker* v. *Marston*, 27 Me. 196; *Brown* v. *Brown*, 18 Conn. 410; *Chase* v. *Redding*, 13 Gray, 418; *Harris* v. *Clark*, 2 Barb. 94; *Waring* v. *Edmonds*, 11 Md. 424; *Westerlo* v. *De Witt*, 36 N. Y. (9 Tiff.) 340; *Turpin* v. *Thompson*, 2 Metc. (Ky.) 421. So, shares of stock (*Grymes* v. *Hone*, 49 N. Y. [4 Sick.] 17; S. C., 10 Am. Rep. 313; *Moore* v. *Moore*, L. R., 18 Eq. 474); 10 Eng. R. 788); a savings-bank deposit (*Tillinghast* v. *Wheaton*, 8 R. I. 536; 5 Am. Rep. 621; *Beak* v. *Beak*, L. R., 13 Eq. 489; 2 Eng. R. 390); or checks of third persons (*Gibson* v. *Hibbard*, 13 Mich. 214); or a policy of insurance on the donor's life, may be the subject of a *donatio causa mortis*. *Witt* v. *Amis*, 1 B. & S. 109. And so, of the obligation of the donee himself; the gift in such case amounting to a forgiveness of the debt. *Moore* v. *Darton*, 4 DeG. & Sm. 517; *Lee* v. *Boak*, 11 Gratt. (Va.) 162.

It is, however, well-settled law, that a mere contract, liability, or obligation of the donor, is not the proper subject of a *donatio causa mortis*. Thus, there can be no valid gift *causa mortis* of the donor's own promissory note, payable to the donee. *Smith* v. *Kittridge*, 21 Vt. 238; *Parish* v. *Stone*, 14 Pick. 198; *Harris* v. *Clark*, 3 N. Y. (3 Comst.) 93; *Brown* v. *Moore*, 3 Head, 671. And without acceptance or some special understanding on its part, a bank will not be liable to the payee for the amount of a check given away *causa mortis* by the drawer. *Second National Bank* v. *Williams*, 13 Mich. 282; *McKenzie* v. *Downing*, 25 Ga. 669; *In re Beak's Estate*, L. R., 13 Eq. 489; 2 Eng. R. 390. See, also, *Starr* v. *Starr*, 9 Ohio St. 74; *Flint* v. *Pattee*, 33 N. H. 520; *Brown* v. *Moore*, 3 Head (Tenn.), 671.

§ 3. **What constitutes a gift.** See *ante*, 487, § 1. To constitute a *donatio mortis causa* there must not only be a clear intention to give, but an executed gift. *Cutting* v. *Gilman*, 41 N. H. 147. There must be a subject capable of passing by delivery, and an actual delivery at the time of the alleged gift. *Egerton* v. *Egerton*, 17 N. J. Eq. 419; *Cutting* v. *Gilman*, 41 N. H. 147, 153; *Singleton* v. *Cotton*, 23 Ga. 261. So, there must be an acceptance of the thing by the donee, so far as it is possible; for no presumption in favor of acceptance can

here prevail against plain evidence to the contrary, any more than in gifts *inter vivos*. See *Delmotte* v. *Taylor*, 1 Redf. (N. Y.) 417.

The gift must be made by the donor in contemplation of the near approach of death (*Edwards* v. *Jones*, 1 My. & Cr. 233, 236); otherwise it will not be a good gift *causa mortis*. *Walter* v. *Hodge*, 2 Swanst. 97, 100. A vague and general impression that death may occur from those casualties which attend all human affairs, but which are still too remote and uncertain to be regarded as objects of present contemplation and apprehended danger, is insufficient. Hence, it has been held that a soldier who is about to join his regiment in time of war cannot make a *donatio causa mortis*, or any gift which is to take effect in the event of his death during the campaign. *Irish* v. *Nutting*, 47 Barb. 370; *Dexheimer* v. *Gautier*, 34 How. (N. Y.) 472; S. C., 5 Robt. 216; *Smith* v. *Dorsey*, 38 Ind. 451; 10 Am. Rep. 118; *Gourley* v. *Linsenbigler*, 51 Penn. St. 345. A gift will, however, be presumed to be in contemplation of death, where the donor is "in his last sickness," or "languishing on his death-bed." *Miller* v. *Miller*, 3 P. Wms. 356; *Walter* v. *Hodge*, 2 Swanst. 100. But see *Blount* v. *Burrow*, 1 Ves. Jr. 546.

One who was fleeing from the Confederate conscription in East Tennessee was held to have been under sufficient apprehension of death to make a valid *donatio mortis causa*. *Gass* v. *Simpson*, 4 Coldw. (Tenn.) 288. And see *Virgin* v. *Gaither*, 42 Ill. 39.

So, the gift must be intended to take complete effect only after the donor's decease. *Tate* v. *Hilbert*, 2 Ves. Jr. 120. But this intention need not be expressly declared. If the gift is made in expectation of death, there is an implied condition that it is to be held only in the event of death. *Rhodes* v. *Child*, 64 Penn. St. 18. Thus, A being seriously ill, two days before his death, in the presence of a servant, gave B a bond, saying at the same time, "there, take that, and keep it," and the gift was held to be a valid *donatio causa mortis*. *Gardner* v. *Parker*, 3 Madd. 184. On the other hand, if it appear, from the circumstances of the transaction, that the donor intended to make an immediate and irrevocable gift, it will not be a valid gift *causa mortis*. Thus, where the obligee of a bond, five days before her death, signed an indorsement, not under seal, upon the bond, as follows: "I, M. C., do hereby assign and transfer the within bond or obligation, and all my right, title and interest thereto, unto and to the use of my niece E. E., with full power and authority for the said E. E. to sue for and recover the amount thereof, and all interest now due, or hereafter to become due, thereon," it was held that the gift could not take effect as a *donatio*

causa mortis, as an absolute and irrevocable gift was intended. *Edwards* v. *Jones*, 1 My. & Cr. 226; 1 Lead. Cas. Eq. 926.

According to the weight of authority, the donee must not only take possession, but he must also maintain it till the donor's death. And proof that it was resumed by the donor will negative the gift, unless it appears that he acted as the donee's agent or bailee, or under an express or implied license from him. *Hatch* v. *Atkinson*, 56 Me. 324; *Craig* v. *Craig*, 3 Barb. Ch. 76; *Cutting* v. *Gilman*, 47 N. H. 147. See *ante*.

No particular form of words is necessary to give effect to a gift *causa mortis*, if the evidence of that which was said and done establishes the requisition for its validity. *Kenistons* v. *Sceva*, 54 N. H. 24.

The power of a married woman to make a *donatio mortis causa*, rises no higher than that to bequeath by will; and the gift, consequently, will not be valid without the consent of the husband, which must be affirmatively shown. *Jones* v. *Brown*, 34 N. H. 439; 1 Lead. Cas. Eq. (4th Am. ed.) 1251.

A mere promise made by one in his last illness to give at his death, is void for the want of a consideration, and confers, of itself, no legal right or title. *Chevallier* v. *Wilson*, 1 Tex. 161.

§ 4. **What delivery required.** Corporeal chattels require manual delivery, which may, however, vary somewhat, according to the subject-matter. Bank notes circulating as cash will pass as a gift *causa mortis* by such delivery. *Hill* v. *Chapman*, 2 Bro. C. C. 612; *Miller* v. *Miller*, 3 P. Wms. 356. In some cases the delivery of a symbol may be sufficient for a gift *causa mortis*, if the delivery be otherwise consistent with the owner's intention to give. Thus, a delivery of the means of getting the possession and enjoyment of the thing, as of the key of a trunk or a warehouse in which the subject of the gift is deposited, may amount to actual delivery, for the purpose of a gift. *Ward* v. *Turner*, 2 Ves. Sen. 443; *Jones* v. *Brown*, 34 N. H. 439; *Miller* v. *Jeffress*, 4 Gratt. (Va.) 472; *Cooper* v. *Burr*, 45 Barb. 9. But the rule is, that the delivery must be as perfect and complete as the nature of the articles will admit of. And it is said to be well settled, that delivery of the key of a trunk, chest, or box, in which valuable articles are kept, which are capable of being taken into the hand, and may be delivered by being passed from hand to hand, is not a valid delivery of such articles. *Hatch* v. *Atkinson*, 56 Me. 324. See, also, *Powell* v. *Hellicar*, 26 Beav. 261; 2 Kent's Com. 446.

And taking the key of a trunk from the place where it is kept, putting goods into the trunk and returning the key to its place, at the

request of the owner in his last sickness, he apprehending death, and expressing the desire to make a gift of the trunk and contents *mortis causa*, is held not to be a delivery sufficient for that purpose. *Coleman* v. *Parker*, 114 Mass. 30. It would be otherwise, however. had the owner requested the donee to keep the key. Id.

So, merely marking packages with the name of the intended donee, and giving directions for their delivery to him after the donor's death, is held to be an insufficient delivery. *Bunn* v. *Markham*, 7 Taunt. 224. And see *Hawkins* v. *Blewitt*, 2 Esp. 663.

A bond, other than the donor's own obligation, may be disposed of as a gift *causa mortis* by a mere delivery of the instrument, with or without an assignment in writing. *Waring* v. *Waring*, 11 Md. 424; *Wells* v. *Tucker*, 3 Binn. (Penn.) 366. See, also, *Bottle* v. *Knocker*, 35 L. T. (N. S.) 545. So, of a bond and mortgage, *ante*, 488, § 2; and gifts *causa mortis* of bills of exchange, promissory notes, certificates of deposit, coupon bonds and negotiable instruments generally, are now upheld almost universally by the courts, even without an indorsement, provided only the instrument itself be delivered to the donee or some one in his behalf, with the suitable intention of transfer. *Coutant* v. *Schuyler*, 1 Paige, 316; *Borneman* v. *Sidlinger*, 15 Me. 429; *Ashbrook* v. *Ryon*, 2 Bush (Ky.), 228; 2 Schoul. Pers. Prop. 158. The cases all go on the assumption that a bond, note or other security is a valid subsisting obligation for the payment of a sum of money, and the gift is in effect a gift of the money, by a gift and delivery of the instrument that shows its existence and affords the means of reducing it to possession. Shaw, C. J., in *Parish* v. *Stone*, 14 Pick. 198.

Deposit notes and certificates of deposit, or any other document by which the depositary acknowledges that he holds so much money belonging to the donor at his disposal, may also pass by delivery as a gift *causa mortis*. *Amis* v. *Witt*, 33 Beav. 619; *Hewitt* v. *Kaye*, L. R., 6 Eq. 198. So, if one deliver a policy of life insurance, saying, "this is yours," it will operate as a gift *causa mortis* of the money due on the policy. *Witt* v. *Amis*, 1 B. & S. 109; S. C., 33 Beav. 619. See *Trough's Estate*, 75 Penn. St. 115; *Rummens* v. *Hare*, L. R., 1 Exch. Div. 169; 16 Eng. R. 581. And gifts of stock upon a mere delivery of the certificate to the donee, without any writing, have been sustained. *Walsh* v. *Sexton*, 55 Barb. 251; *Grymes* v. *Hone*, 49 N. Y. (4 Sick.) 17; S. C., 10 Am. Rep. 313. But see *Egerton* v. *Egerton*, 17 N. J. Eq. 419; *Pennington* v. *Gittings*, 2 Gill & J. (Md.) 208; *Moore* v. *Moore*, L. R., 18 Eq. 474; 10 Eng. R. 788; *Lambert* v. *Overton*, 13 W. R. 227. So, it has been held that the gift *causa*

mortis of a savings bank deposit is sufficiently completed on delivery of the pass-book. *Tillinghast* v. *Wheaton*, 8 R. I. 536; 5 Am. Rep. 621. And see *Camp's Appeal*, 36 Conn. 88; 4 Am. Rep. 39. But see *contra*, *McGonnell* v. *Murray*, 3 Ir. Eq. 460; *Ashbrook* v. *Ryon*, 2 Bush (Ky.), 228. Where a woman who had money on deposit in the savings bank, during her last sickness, told a girl who lived with her, and had the custody of her bank book, to get the book, which being done, said, "take that and keep it, and lock it up," and the girl retained the book,—it was held, assuming that a savings bank book may be the subject of a *donatio causa mortis*, that the transaction did not constitute a sufficient delivery. *Fiero* v. *Fiero*, 2 Hun (N. Y.), 600; S. C., 5 N. Y. Sup. (T. & C.) 151. So, a man in expectation of death caused a written instrument to be made, by which he gave to A a stated sum of money for certain purposes named, and for the purpose of carrying out its provisions, delivered to him a savings bank book with an order for the payment of the deposits, which made up only a smaller portion of the sum named in the instrument. The donor, when asked by A where the remainder was, said it was in his trowsers' pocket, turning in his bed and looking toward the closet in which the trowsers were, and that E, who owned the house and who was present, would give it to him. After the donor's death, E delivered the money to A,—but it was held, that there was no sufficient delivery of the money to give effect to the gift as a *donatio causa mortis*, and that it could not take effect otherwise than as an entire gift. *McGrath* v. *Reynolds*, 116 Mass. 566. So, where a woman about to die requested her son to get her bank book, then in possession of her son-in-law, settle bills and divide the residue of the deposit among her three children,—it was held that this was not a gift *causa mortis*, for want of a delivery. *Case* v. *Dennison*, 9 R. I. 88; S. C., 11 Am. Rep. 222.

The delivery of the key of a chest or box may be a good delivery of its contents, even when they consist of promissory notes and other securities for the payment of money. *Jones* v. *Brown*, 34 N. H. 439. And see *Walsh* v. *Sexton*, 55 Barb. 251. But the gift of an incorporeal chattel will not take effect, where the instrument is placed in an envelope, with directions for delivery indorsed upon it, and then retained by the donor under his control and dominion until his death. *Phipps* v. *Hope*, 16 Ohio St. 586. And see, also, *Zimmerman* v. *Streeper*, 75 Penn. St. 147; *Trough's Estate*, id. 115.

A delivery of the property to a third person for the donee constitutes as good a gift *causa mortis* as though delivery had been made directly to the donee. Thus, the delivery of a bond or personal chattel

by the owner in his last illness to his wife, for the use of a third person, is held to be a sufficient delivery to make it a good *donatio causa mortis*. *Wells* v. *Tucker*, 3 Binn. (Penn.) 366. See, also, *Michener* v. *Dale*, 23 Penn. St. 59; *Southerland* v. *Southerland*, 5 Bush (Ky.), 591; *Clough* v. *Clough*, 117 Mass. 83. And the property may be delivered to one of several donees for the use of all. *Dresser* v. *Dresser*, 46 Me. 48. But a mere delivery to an agent, in the character of an agent for the giver, will not be sufficient. *Farquharson* v. *Cave*, 2 Coll. 356, 367. A difference between a gift *inter vivos* and a gift *causa mortis* is apparent in this, that, as it respects the former, the authority of one who takes from the giver to deliver to the donee is revoked by the giver's death; but, in the latter kind of a gift, if the thing be delivered to and accepted by the donee, after the decease of the donor, it is sufficient. *Sessions* v. *Moseley*, 4 Cush. 87.

A gift *causa mortis* cannot be sustained when there has been no delivery of the subject of the gift so claimed, although, at the time it was sought to be made, it was out of the reach of the would-be donor, so that the delivery was impossible. *Case* v. *Dennison*, 9 R. I. 88; S. C., 11 Am. Rep. 222. See *Hunt* v. *Hunt*, 119 Mass. 474; *Picot* v. *Sanderson*, 1 Dev. (N. C.) L. 309.

But although delivery is necessary to perfect a gift *causa mortis*, yet where a testator gives express direction to a residuary legatee to deliver an article of property to an individual as a gift, and the legatee promises to do so, a court of chancery will declare the legatee a trustee, and enforce a delivery of the articles accordingly. *Sims* v. *Walker*, 8 Humph. (Tenn.) 503. Whether such an arrangement, made in contemplation of death by the party intending the legacy, is equivalent to a delivery in the hands of the trustee, so as to take effect as a *donatio causa mortis*, is questioned. *William* v. *Fitch*, 18 N. Y. (4 Smith) 546.

A man, on his death-bed, gave his wife a crossed check, and afterward, remembering that it was crossed, he asked a friend to take it, and give the wife another in its stead. The friend complied, but his check was post-dated. The testator's check was paid, before he died, to his friend, who, after that event, gave to the widow a check not post-dated for the other. It was held, that the transaction constituted a good *donatio mortis causa*. *Boutts* v. *Ellis*, 17 Beav. 121; S. C., 4 De G., M. & G. 249.

The Roman law in the time of Justinian required every *donatio causa mortis* to be executed in the presence of five witnesses. See *Hatch* v. *Atkinson*, 56 Me. 326; *Grymes* v. *Hone*, 49 N. Y. (4 Sick.) 23. But in the English law no other or different proof is required to

establish a gift of this description than one *inter vivos*. *Bedell* v. *Carll*, 33 N. Y. (6 Tiff.) 581, 585; *ante*, 494, art. 1, § 6. And gifts *causa mortis* may be established upon the oral testimony of a single unimpeached witness, as to slight words and acts amounting to delivery; and where the intent of the donor is proved under his own hand, the courts have presumed a delivery in support of the gift, on very slight evidence. See *Brinckerhoff* v. *Lawrence*, 2 Sandf. Ch. 401, 406. The burden of proof is, however, on the donee, and he must show not only that the subject-matter was handed over, but that the transfer was made with the intent to pass the right of property; and ambiguous expressions will be interpreted against him, and in favor of the donor and his legal representatives. *Hayslep* v. *Gymer*, 1 Ad. & El. 162; *Cosnahan* v. *Grice*, 15 Moore's P. C. C. 215; *Hebb* v. *Hebb*, 5 Gill. (Md.) 506; *Boudreau* v. *Boudreau*, 45 Ill. 480; *First National Bank* v. *Balcom*, 35 Conn. 351; 1 Lead. Cas. Eq. (4th Am. ed.) 1241. And statements of the donor showing a previous and continuous purpose inconsistent with the alleged gift are admissible to contradict the donee's testimony. *Whitney* v. *Wheeler*, 116 Mass. 490. It would seem that, as a general rule, a gift *causa mortis*, made by deed of gift or other writing, without delivery, would not be recognized by our courts, unless the writing were executed with such formalities that it could be set up as a testamentary instrument, and regularly admitted to probate. See *Thorold* v. *Thorold*, 1 Phillim. 1; *Nicholas* v. *Adams*, 2 Whart. (Penn.) 17; *Taylor* v. *Taylor*, 2 Humph. (Tenn.) 597; *Smith* v. *Downey*, 3 Ired. (N. C.) Eq. 268; 2 Schoul. on Pers. Prop. 168. The opinion has, however, been held, that the delivery of a deed of gift may pass the title to the chattels or securities which are the subject-matter of the gift, although they are not actually handed over to the donee. *Meach* v. *Meach*, 24 Vt. 591. See *Gilmore* v. *Whitesides*, Dudley's (S. C.) Eq. 14, 18.

§ 5. **Effect of gift.** The donee of a gift *causa mortis* claims directly from the donor in his life-time, and not from the donor's executor or other personal representative. Nor has the executor or administrator any claim whatever upon the property for the ordinary purposes of administration and the claims of distributees. *Gaunt* v. *Tucker*, 18 Ala. 27; *Marshall* v. *Berry*, 13 Allen, 43, 46. And if the donor's executor or administrator has received the thing which was the subject of the gift and converted it, the donee may maintain *assumpsit* against him. *Michener* v. *Dale*, 23 Penn. St. 59. See, also, *House* v. *Grant*, 4 Lans. (N. Y.) 296; *Westerlo* v. *De Witt*, 36 N. Y. (9 Tiff.) 340. But a gift *causa mortis* cannot be sustained to the prejudice of the just claims of creditors (2 Kent's Com. 448; *Chase* v. *Redding*, 13 Gray,

418); though such a gift is said to be only subject to debts in the same way as other voluntary conveyances and gifts would be. *Marshall* v. *Berry*, 13 Allen, 43, 46. The donee must account for the gift, or its value, at the suit of the executor or administrator, if creditors appear and there be not other estate sufficient to pay their claims. *Borneman* v. *Sidlinger*, 15 Me. 429; *Michener* v. *Dale*, 23 Penn. St. 59; *Drury* v. *Smith*, 1 P. Wms. 406; *Mitchell* v. *Pease*, 7 Cush. 350. And it is held that an executor or administrator, who has admitted claims against the estate of his intestate before they were barred by the special statute of limitations provided for such cases, and has agreed with the creditors to bring a suit for their benefit to recover back a gift *causa mortis*, may sue after the expiration of such period of limitation; and in a suit in equity for such purpose, he may likewise recover costs and the expenses of administration, if the defendant, instead of admitting a liability for such debts, had denied that the suit could be maintained against him. *Chase* v. *Redding*, 13 Gray, 418.

There are sometimes other qualifications annexed to gifts *causa mortis* besides the condition of expected death. Thus, such a gift may be good, although coupled with the trust that the donee shall provide for the donor's funeral. *Hills* v. *Hills*, 8 M. & W. 401. Or, it may be upon the condition that the donee shall receive nothing further from the donor's estate; in which case the donee, upon claiming a distributive share, will be required to surrender or account for the donation. *Currie* v. *Steele*, 2 Sandf. (N. Y.) 542. But a qualified gift *causa mortis* cannot be supported as such, if it be intended, not for the benefit of the donee, but as a trust fund to be dispensed for benevolent uses at the entire and unlimited discretion of the donee. *Dole* v. *Lincoln*, 31 Me. 422.

§ 6. **Revocation.** Until fully confirmed by the donor's death (see *Marshall* v. *Berry*, 13 Allen, 46), the title acquired by gift *causa mortis* is held to be specially revocable in the following instances: *First*, by the recovery of the donor; *Second*, by his repentance of the gift; and *Third*, by the death of the donee before the donor's decease. These are separate and independent conditions, adopted from the civil law. See *Merchant* v. *Merchant*, 2 Bradf. (N. Y.) 445.

It is universally conceded that if the donor recovers, or survives the donee, the gift will fail. See *Staniland* v. *Willott*, 3 Mac. & G. 664; *Wells* v. *Tucker*, 3 Binn. (Penn.) 370; *Parker* v. *Marston*, 27 Me. 196. And where the gift was made while the donor was in expectation of immediate death from consumption, and he afterward so far recoverd as to attend to his ordinary business for eight months, but finally died from the same disease, it was nevertheless held to be a revocation of

the gift. *Weston* v. *Hight*, 17 Me. 287. It has, however, been said, that a transfer of this kind ought not to be disturbed "by the alternation of hope and despair, dependent on the doubtful spinning of the die, but only by the turn-up of life." GIBSON, C. J., in *Nicholas* v. *Adams*, 2 Whart. (Penn.) 17. See *Craig* v. *Kittredge*, 46 N. H. 57; *Irish* v. *Nutting*, 47 Barb. 370.

It is likewise in the power of the donor at any time to revoke the donation before his death. *Bunn* v. *Markham*, 7 Taunt. 224; *Wigle* v. *Wigle*, 6 Watts, 522. And his declared intention to repossess himself of the property cannot be defeated by the custodian's unwillingness to return it. *Merchant* v. *Merchant*, 2 Bradf. (N. Y.) 432. So, upon a recovery of the property by a revocation of his gift *causa mortis* it may be afterward given to any other person, or otherwise disposed of at the pleasure of the owner. *Parker* v. *Marston*, 27 Me. 196.

That a gift *causa mortis* is revoked by the donee's death, before that of the donor, is undoubted. See *Wells* v. *Tucker*, 3 Binn. (Penn.) 366, 370; *Merchant* v. *Merchant*, 2 Bradf. (N. Y.) 432. But it is thought that the prior death of a third person charged with delivery to the donee after the donor's death would not invalidate the gift to the donee, provided the latter himself survived the donor. Id.; 2 Schoul. Pers. Prop. 177. But see *Borneman* v. *Sidlinger*, 15 Me. 429.

It is held that a *donatio causa mortis* is not revoked by the donor's subsequent will; for the reason, that on the donor's death the donee's title becomes absolute, and therefore irrevocable by a will, which from its nature is inoperative during the donor's life-time, the only period during which the donation could be revoked. *Merchant* v. *Merchant*, 2 Bradf. (N. Y.) 432, 443; *Nicholas* v. *Adams*, 2 Whart. (Penn.) 17; *Hambrooke* v. *Simmons*, 4 Russ. 25. But it seems that the subsequent birth of a child may operate as a revocation of a gift *causa mortis*. *Bloomer* v. *Bloomer*, 2 Bradf. (N. Y.) 339.

As in the case of ordinary gifts, the parties to a *donatio causa mortis* may, of course, by their own mutual assent, put an end to the transfer; and gifts *causa mortis* may also be annulled like ordinary gifts, on the ground of mental incapacity, fraud, force, or palpable error. See *ante*, 500, art. 1, § 15.

CHAPTER LXXIV.

GOODS BARGAINED AND SOLD.

ARTICLE I.

GENERAL PRINCIPLES.

Section 1. In general. An action for goods bargained and sold materially differs from an action to recover the price of goods sold and delivered. To support the latter, proof of an actual delivery to, and acceptance by, the purchaser of the goods sued for is essential. *Atwood* v. *Lucas*, 53 Me. 508; *Evans* v. *Harris*, 19 Barb. 416. But the count for goods bargained and sold lies, where upon a sale of goods the property has passed to the purchaser, and the contract has been completed in all respects except delivery, and the delivery was not a part of the consideration for the price or a condition precedent to its payment. *Simmons* v. *Swift*, 5 B. & C. 859; *Atkinson* v. *Bell*, 8 id. 277; *Forbes* v. *Smith*, 11 W. R. 574; *Stearns* v. *Washburn*, 7 Gray, 187, 189. And see *Hague* v. *Porter*, 3 Hill, 141; *Merrill* v. *Parker*, 24 Me. 89. It is not essential to show that there was any thing more than a valid contract of sale, and a performance by the plaintiff of his part of the agreement. If there is a valid contract of sale, the vendor may retain the possession of the goods until the purchase-price has been paid, but the contract to pay the price is nevertheless in full force as against the defendant. *Scott* v. *England*, 2 D. & L. 520. If the purchaser refuses to pay the price and take the goods, the vendor may retain them in his possession, and still bring his action against the purchaser for his refusal to take and pay for them. And, in such an action, if the plaintiff establishes that the goods were bargained and sold to the defendant, he may recover a judgment for the purchase-price, and retain possession of the goods until such judgment is collected. *Hanna* v. *Mills*, 21 Wend. 90; *Chamberlain* v. *Furr*, 23 Vt. 265; 1 Wait's L. & Pr. 675. The vendor is not, however, compelled to retain the goods in such a case, but he may resell them on due notice to the purchaser, for the most he can get, and then recover the difference between the contract price and the price actually obtained. *Sands* v. *Taylor*, 5 Johns. 395; *Atwood* v. *Lucas*, 53 Me. 508.

The count for goods bargained and sold will not lie if the property has not passed. *Atkinson* v. *Bell*, 2 Mann. & Ryl. 292; S. C., 8 B. & C. 277. And, generally speaking, if any thing remains to be done on the part of the vendor, such as weighing, measuring or counting out of a common parcel, until that is done the property is not changed. *Simmons* v. *Swift*, 5 B. & C. 857; *Downer* v. *Thompson*, 2 Hill, 137. The parties have, however, the right, by express contract, to prescribe the terms upon which the title to personal property shall vest in the purchaser, without such measurement or weighing. And when such an agreement is made, the title will be held to have vested in the purchaser from the moment the terms specified in such agreement have been complied with. *Dexter* v. *Bevins*, 42 Barb. 573. And see *Bradley* v. *Wheeler*, 44 N. Y. (5 Hand) 495; *Graff* v. *Fitch*, 58 Ill. 373; 11 Am. Rep. 85; *Groat* v. *Gile*, 51 N. Y. (6 Sick.) 431; *Riddle* v. *Varnum*, 20 Pick. 280; *Gilmour* v. *Supple*, 11 Moore's P. C. 551, 566; *Joyce* v. *Swann*, 17 C. B. (N. S.) 84. And an act to be done by the buyer, as the weighing by him of the goods, does not prevent the property from passing. *Turley* v. *Bates*, 2 H. & C. 200.

Where a man sells part of a large parcel of goods, and it is at his option to select part for the vendee, he cannot maintain an action for goods bargained and sold, until he has made that selection. *Boswell* v. *Kilborn*, 15 Moore's P. C. C. 309; S. C., 8 Jur. (N. S.) 443. But as soon as he appropriates part for the benefit of the vendee, the property in the article sold passes to the vendee, although the vendor is not bound to part with the possession until he is paid the price. *Rohde* v. *Thwaites*, 6 B. & C. 388.

An action for goods bargained and sold is held to be a good action against a vendee for refusing to take them on a false allegation that they were damaged. *Hankey* v. *Smith*, Peake, 42, n. So, although goods are stopped *in transitu*, the vendor, after the credit has expired, may recover for them in an action for goods bargained and sold, if he is ready to deliver them on the price being paid. *Kymer* v. *Suwercropp*, 1 Camp. 109. But after a re-sale the action will not lie. *Hore* v. *Milner*, Peake, 42, n; *Lamond* v. *Davall*, 9 Q. B. 1030. It is, however, held, that in an action for not taking away goods sold at a public auction, and for a loss on the re-sale, the plaintiff may recover on the count for goods bargained and sold (*Mertens* v. *Adcock*, 4 Esp. 251); and it is no objection to his right to recover, that he has not the goods then to deliver in case he had a verdict. Id.

It has been held that the price of goods bargained and sold may be recovered in an action on a common count. *Turley* v. *Bates*, 2 H. & C. 200; *Morse* v. *Sherman*, 106 Mass. 430. But see *Atwood* v.

Lucas, 53 Me. 508. And a declaration for goods sold and delivered may be amended by adding a count for goods bargained and sold, without changing the form or the cause of action. *Spicers* v. *Harvey*, 9 R. I. 582; *Jenness* v. *Wendell*, 51 N. H. 63; 12 Am. Rep. 48; 1 Chit. Pl. (16th Am. ed.) 358.

§ 2. **What are goods, etc.** The meaning of the words "goods, wares and merchandise," contained in the seventeenth section of the statute of frauds, has been the subject of a great deal of discussion in the English and American cases. The English rule, as finally settled, lays especial stress upon the point, whether the articles bargained for can be regarded as goods capable of sale by the professed seller at the time of delivery, without any reference to the inquiry whether they were in existence at the time of the contract or not. If a manufacturer is to produce an article which, at the time of the delivery, could be the subject of sale by him, the case is within the statute of frauds.

But it is otherwise where work is done upon the goods of another, or even where materials are supplied or added to the goods of another. Thus, in an action brought by a dentist to recover twenty-one pounds sterling for two sets of artificial teeth, made for a deceased lady of whose estate the defendant was executor, the court held this to be the sale of a chattel within the statute of frauds. And Blackburn, J., stated the principle of the decision to be that, "if the contract be such that it will result in the sale of a chattel, then it constitutes a sale, but if the work and labor be bestowed in such a manner as that the result would not be any thing which could properly be said to be the subject of sale, the action is for work and labor." *Lee* v. *Griffin*, 1 Best & Sm. 272. And see Benj. on Sales, 82; *Prescott* v. *Locke*, 51 N. H. 94; S. C., 12 Am. Rep. 55; *Pitkin* v. *Noyes*, 48 N. H. 294; S. C., 2 Am. Rep. 218.

The Massachusetts rule is stated to be, that a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business, manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. *Mixer* v. *Howarth*, 21 Pick. 205. Under this rule, a contract to buy a certain number of boxes of candles at a fixed price per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale and within the statute. *Gardner* v. *Joy*, 9 Metc. 177. See, also, *Clark* v. *Nichols*, 107 Mass. 547. On the other hand, a contract with a carriage manu-

facturer, that he should make a buggy for the person ordering it, that the color of the lining should be drab, the outside seat of cane, and have on it the monogram and initials of the party for whom it was made, was held not to be a contract of sale within the statute. *Goddard* v. *Binney*, 115 Mass. 450; S. C., 15 Am. Rep. 112. And see *Lamb* v. *Crafts*, 12 Metc. 353. See, also, *Passaic Manuf. Co.* v. *Hoffman*, 3 Daly (N. Y.), 495; *Atwater* v. *Hough*, 29 Conn. 508; *Cason* v. *Cheely*, 6 Ga. 554; *Cummings* v. *Dennett*, 26 Me. 397.

In New York, where the words of the statute are "goods, chattels, or things in action," a still different rule has been adopted. According to a long course of decisions in that State, and in some other States of the Union, an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale within the meaning of the statute. *Crookshank* v. *Burrell*, 18 Johns. 58; *Downs* v. *Ross*, 23 Wend. 270; *Ferren* v. *O'Hara*, 62 Barb. 517; *Smith* v. *N. Y. Cent. R. R. Co.*, 4 Abb. Ct. App. 262; S. C., 4 Keyes, 180; *Eichelberger* v. *M'Cauley*, 5 Harr. & J. (Md.) 213. The statute alludes to a *sale* of goods, assuming that the articles are already in existence. *Parsons* v. *Loucks*, 48 N. Y. (3 Sick.) 17; S. C., 8 Am. Rep. 517. And, therefore, a contract to manufacture and deliver a quantity of paper, such paper to be thereafter manufactured at the contractor's mill, is not within the statute. Id. But where a chattel contracted for is at the time in existence, although the vendor is to do some work upon it to adapt it to the uses of the vendee, the contract will be deemed one of sale under the statute. *Cooke* v. *Millard*, 65 N. Y. (20 Sick.) 352. See, also, *Edwards* v. *Grand Trunk Railroad*, 54 Me. 105; *Pattison's Appeal*, 61 Penn. St. 294; *Buck* v. *Pickwell*, 27 Vt. 157; *Allen* v. *Jarvis*, 20 Conn. 38; *Sawyer* v. *Ware*, 36 Ala. 675.

In the later English cases, it is held that the terms "goods, wares and merchandise," in the seventeenth section of the statute, comprehend all corporeal movable property, but do not include shares, stocks, documents of title, choses in action, and other incorporeal rights and property. Thus, it has been held that the statute does not apply to a sale of railway shares (*Bradley* v. *Holdsworth*, 3 M. & W. 422; *Tempest* v. *Kilner*, 3 Com. B. 249); or to a sale of shares in a joint-stock banking company (*Humble* v. *Mitchell*, 11 Ad. & El. 205); or to a sale of shares in a mining company on the cost-book principle (*Powell* v. *Jessopp*, 18 Com. B. 336; *Watson* v. *Spratley*, 10 Exch. 222), nor to a sale of stock of a foreign State. *Heseltine* v. *Siggers*, 1 Exch. 856.

The American decisions are far from being uniform on the subject, but the better opinion seems to be, that the terms, "goods, wares and merchandise," include shares in incorporated companies. See *Tisdale* v. *Harris*, 20 Pick. 13; *Southern Life, etc., Trust Ins. Co.* v. *Cole*, 4 Fla. 359; *North* v. *Forrest*, 15 Conn. 404; *Colvin* v. *Williams*, 3 Harr. & J. (Md.) 38. A contract for the sale of promissory notes was held to be within the statute in *Baldwin* v. *Williams*, 3 Metc. (Mass.) 365. See, also, *Gooch* v. *Holmes*, 41 Me. 523. But see *contra*, *Hudson* v. *Weir*, 29 Ala. 294; *Whittemore* v. *Gibbs*, 4 Fost. (N. H.) 484. And it was decided in *Beers* v. *Crowell*, Dudley (Ga.) 28, that treasury checks on the bank of the United States were not within the statute.

An agreement to transfer property in any thing attachea to the soil at the time of the agreement, but which is to be severed from the soil, and converted into goods, before the property is transferred to the purchaser, is an agreement for the sale of "goods," and is within the statute. *Smith* v. *Surman*, 9 B. & C. 561; *Parker* v. *Staniland*, 11 East, 362; *Sainsbury* v. *Matthews*, 4 M. & W. 343; Benj. on Sales, 93. See, also, *Smith* v. *New York Central R. R. Co.*, 4 Keyes, 180; S. C. 4 Abb. Ct. App. 262; *Owens* v. *Lewis*, 46 Ind. 488; S. C., 15 Am. Rep. 295. But where there is a perfect bargain and sale, vesting the property at once in the buyer before severance, a distinction is made between the natural growth of the soil, such as grass, trees, etc., which at common law are part of the soil, and crops produced by the annual labor of man, in sowing and reaping, planting and gathering. The former are an interest in land, the latter are chattels. *Evans* v. *Roberts*, 5 B. & C. 836; *Carrington* v. *Roots*, 2 M. & W. 248; *Jones* v. *Flint*, 10 Ad. & El. 753; *Teal* v. *Auty*, 2 Brod. & Bing. 101; *Powers* v. *Clarkson*, 17 Kans. 218; *ante*, Vol. 2, 222. And see *post*, title *Sale*.

§ 3. **Sale, and refusal by vendor to deliver.** After a contract has been made for the sale of goods, the vendor is entitled to retain the possession of them until the purchaser pays the price, unless it is agreed that a certain time shall be given for the payment. *Metz* v. *Albrecht*, 52 Ill. 491. But the purchaser need not, in an action by him against the vendor for a non-delivery, prove any demand of the goods sold, it will be sufficient to prove that he was able, ready and willing, at the time and place fixed for the delivery of the goods, to accept and pay for them, according to the agreement. *Vail* v. *Rice*, 5 N. Y. (1 Seld.) 155; *Mount* v. *Lyon*, 49 N. Y. (4 Sick.) 552. And see *Phillips* v. *Williams*, 39 Ga. 597. And if the vendor refuses to deliver the property when it is demanded of him, the purchaser is not

bound to tender or offer the money to him. *Anderson* v. *Sherwood*, 56 Barb. 66. So, where the delivery of property purchased and the payment of the price are by the contract to be concurrent acts, and the vendor has disabled himself from performing the contract, it is not necessary that the purchaser should pay or tender the price, before bringing his suit against the vendor. *Clark* v. *Crandall*, 3 Barb. 612. See, also, *Boies* v. *Vincent*, 24 Iowa, 387; *Foster* v. *Leeper*, 29 Ga. 294.

If it is a part of the contract that a certain time shall be given for the payment, and that the goods shall then be delivered, the vendor is bound to be ready to deliver the goods at that time when called on for that purpose by the purchaser, and he must make an actual delivery, upon the purchaser's tendering or paying the price. *Barr* v. *Logan*, 5 Harr. (Del.) 52. If there be a total failure on the part of the vendor to have the goods ready for delivery, or, if he refuse or neglect to deliver them, the purchaser may utterly rescind the contract, and bring an action for money had and received, if the price has been paid, or he may affirm the contract, and bring an action for the damages which may have been sustained. Id.; *Lawrence* v. *Knowles*, 5 Bing. N. C. 399; S. C., 7 Scott, 181; *Judson* v. *Wass*, 11 Johns, 528.

So, if the seller, after the title has passed to the buyer, refuse to deliver the goods, the latter may, if not in default, obtain redress by an action of trover. *Ferguson* v. *Carrington*, 3 Carr. & P. 457; S. C., 9 B. & C. 59; *Chinery* v. *Viall*, 5 H. & N. 288. But, so long as any thing remains to be done by the seller, in order to transfer the title, or so long as payment is not made, when, by the terms of the contract, credit is not given, the action of trover cannot be maintained. *Bloxam* v. *Sanders*, 4 B. & C. 941; *Wilmhurst* v. *Bowker*, 5 Bing. N. C. 541; *Conway* v. *Bush*, 4 Barb. 565; Story on Sales, § 449. If property sold cannot be identified, either from the contract or by evidence, the purchaser cannot maintain trover. *Browning* v. *Hamilton*, 42 Ala. 484.

Courts of equity in certain cases compel the vendor to deliver the specific chattel sold. The question in all cases where the specific performance of an agreement relative to personalty is sought is this: Will damages at law afford an adequate compensation for breach of the agreement? If they will, there is no occasion for the interference of equity, the remedy at law is complete; if they will not, a specific performance of the agreement will be enforced. White & Tudor's Lead Cas. Eq. (4th ed.) 792. In *Falcke* v. *Gray*, 4 Drew. 659, it was held that a contract for the purchase of articles of unusual beauty, rarity, and distinction, such as objects of *vertu*, will be enforced. See *post*, title *Specific Performance*.

Where goods are sold and agreed to be delivered on demand, and payment is to be made *in futuro*, an action will lie for non-delivery of the goods, though the demand be not made for them till after the time of payment has elapsed, and it is not necessary to allege payment, tender, or readiness to pay, by the plaintiff, the agreements being independent. *Dox* v. *Dey*, 3 Wend. 356.

In an executory contract for the sale and a future delivery of personal property, to put the seller in default, proof of a demand and of a readiness to receive and ability to pay is essential where the time and place of the delivery has not been fixed by the contract, and where the place is to be designated by the party who is to receive the same. *Sorrell* v. *Craig*, 8 Ala. 567; *Boody* v. *Rutland, etc., R. R. Co.*, 24 Vt. 660; *Beard* v. *Sloan*, 30 Ind. 279; *Isaacs* v. *New York Plaster Works*, 8 J. & Sp. (N. Y.) 277. See cases cited above.

A purchaser may waive an imperfection in goods sold to him, and offer to receive them and pay therefor the contract price, and upon such offer the seller is bound to deliver, and his refusal subjects him to the payment of such damages as the plaintiff may have thereby sustained. *Townsend* v. *Shepard*, 64 Barb. 41.

Where there is a contract for the sale of goods to be delivered by installments, the price of each installment being payable on delivery, and the buyer does not pay for one delivery under such circumstances as to give the seller reasonable ground for believing that he will be unable to pay for the future deliveries, and that he does not intend to go on with the contract, the seller is justified in repudiating it. *Bloomer* v. *Bernstein*, L. R., 9 C. P. 588; 10 Eng. R. 319. See, also, *Withers* v. *Reynolds*, 2 B. & Ad. 882; *Webb* v. *Stone*, 4 Fost. (N. H.) 282; *Stephenson* v. *Cady*, 117 Mass. 6. So, strict performance of a seller's engagement to deliver was held to be excused by the buyer's giving notice (through mistake) that he had probably delivered enough; but, on discovery of the mistake, the obligation to deliver was held to be revived. *Coffin* v. *Reynolds*, 21 Minn. 456. So, under a contract for the sale and delivery of specified articles of personal property, if, before the title has vested in the purchaser, the property is destroyed by an accident, without the fault of the vendor, so that delivery becomes impossible, the latter is not liable to the former in damages for the non-delivery. *Dexter* v. *Norton*, 57 Barb. 272; S. C. affirmed, 47 N. Y. (2 Sick.) 62; S. C., 7 Am. Rep. 415. And see *Seckel* v. *Scott*, 66 Ill. 106.

B agreed to sell and deliver to L, at certain times, twenty-five hundred cubic feet of "marble, to be measured by either party, or together, and, in case of non-agreement, by a third person to be appointed by

the parties; and on measurement and account being made up," B was to be paid a specified price per cubic foot. Upon B's failure to measure the marble and make up an account, it was held, that L was not bound to pay or tender payment therefor before suing for the breach. *Lowry* v. *Barelli*, 21 Ohio St. 324.

Where A and B agreed to sell and deliver to C a certain quantity of grain, to be delivered at M by a day named, and A and C subsequently agreed that one-half of the grain should be delivered at another place, it was held, in a suit by C for damages growing out of a failure to deliver the grain at M, that the subsequent agreement furnished no excuse for not delivering at M., unless it was shown that the same was complied with by A and B. *Cease* v. *Cockle*, 76 Ill. 484.

If the vendor delivers a less quantity of goods than he contracted to deliver, the vendee is at liberty to refuse to accept, and if he accepts a part, he may return that and refuse to accept less than the whole, but having received and retained a part, he cannot refuse to pay for the part received. *Polhemus* v. *Heiman*, 45 Cal. 573. In New York a contrary rule prevails, and the vendor cannot recover without a delivery of the whole of the goods, even though the vendee uses the part of the goods delivered. *Paige* v. *Ott*, 5 Denio, 406. See *Smith* v. *Brady*, 17 N. Y. (3 Smith) 173.

§ 4. **Sale, and refusal by vendee to accept.** When the seller has not transferred to the buyer the property in the goods which are the subject of the contract, as where the agreement is for the sale of goods not specific, or of specific goods which are not in a deliverable state, or which are to be weighed or measured before delivery, the breach by the buyer of his promise to accept and pay can only affect the seller by way of damages. The property in the goods still remains in the seller, and his only action against the buyer is for damages for non-acceptance. See *Alexander* v. *Gardner*, 1 Scott, 281, 630; S. C., 1 Bing. N. C. 671; *Laird* v. *Pim*, 7 M. & W. 478; *Hart* v. *Tyler*, 15 Pick. 171; *Messer* v. *Woodman*, 2 Fost. (N. H.) 172. And although as a general rule, a party cannot recover the full value of a chattel, unless under circumstances which import that the *property has passed* to the defendant (*Laird* v. *Pim*, 7 M. & W. 478), there may be special terms agreed on, conflicting with this rule. Thus, a vendor may say to a buyer, "I want the money on such a day, and I will not sell unless you agree to give me the money on that day, whether you are ready or not to accept the goods;" and if these terms be accepted, the vendor may recover the whole price of goods, the property of which remains vested in himself. *Dunlop* v. *Grote*, 2 Car. & K. 153; Benj. on Sales, 621.

Where a purchaser of goods "to arrive," unreasonably neglects, or refuses to receive the goods, when ready for delivery to him on the arrival of the vessel, he is liable in damages for the delay, and this in a case where the goods were afterward accepted, whether the title had passed before the acceptance, or not. *Dibble* v. *Corbett*, 5 Bosw. (N. Y.) 202; S. C., 9 Abb. 200.

So, if a vendee of goods unreasonably refuses to accept them, the vendor is under no obligation to continue ready to deliver them, and o allow them to perish on his hands, or to become reduced in value; he may sell them, and sue immediately for the damages he has sustained *West* v. *Cunningham*, 9 Port. (Ala.) 104; *Van Horn* v. *Rucker*, 33 Mo. 391; *Ullmann* v. *Kent*, 60 Ill. 271; *Rosenbaums* v. *Weeden*, 18 Gratt. (Va.) 785; *Camp* v. *Hamlin*, 55 Ga. 259. And see *Westfall* v. *Peacock*, 63 Barb. 209.

The date at which the contract is considered to have been broken is that at which the goods were to have been delivered, and not that at which the buyer may give notice that he intends to break the contract and to refuse accepting the goods. *Phillpotts* v. *Evans*, 5 M. & W. 475; *Ripley* v. *M'Clure*, 4 Exch. 345. If the property sold is agreed to be delivered between certain designated dates, it is optional with the purchaser to designate on which of the days he will receive it, and his failure to do so fixes the last day as that on which he may be required to perform the contract. *Sousely* v. *Burns*, 10 Bush (Ky.), 87.

In case the seller was not the actual owner of all the goods tendered in compliance with the contract of sale, but was in a position to deliver them and pass a perfect title, he will, as between the parties, be regarded as the owner, and the buyer's refusal to receive them will render the buyer liable. *Bell* v. *Offutt*, 10 Bush (Ky.), 632.

§ 5. **Damages for non-delivery of goods.** Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy. *Barrow* v. *Arnaud*, 8 Q. B. 604; *Valpy* v. *Oakeley*, 16 id. 941; *Haskell* v. *Hunter*, 23 Mich. 305; *Frink* v. *Tatman*, 36 Ind. 259; S. C., 10 Am. Rep. 19. And see *ante*, Vol. 2, 459, 460. But where the circumstances of the case are such that the vendee cannot thus supply himself, the rule does not apply, for the reason of it ceases (*Bank of Montgomery* v. *Reese*, 26 Penn. St. 143); and the measure of damages then is, the actual loss the vendee sustains. *McHose* v. *Fulmer*, 73 id. 365. See *Brandt* v. *Bowlby*, 2 B. & Ad. 932; *Hinde* v. *Liddell*, L. R., 10 Q. B. 265; 12 Eng. R. 296.

The damages recoverable will be calculated as the market value of the goods at the time and place when and where they ought to have been delivered. *Lawrence* v. *Knowles*, 5 Bing. N. C. 399; S. C., 7 Scott, 181; *Yorke* v. *Ver Planck*, 65 Barb. 316. And evidence of the value of such goods in a foreign market cannot be received upon the question of damages, unless it is averred in the declaration that the goods were bought for that market. *Cofield* v. *Clark*, 2 Col. T. 101. See *Saller* v. *Clelland*, id. 532. Nor can the buyer recover, as special damages, the loss of anticipated profits to be made by his vendees. *Peterson* v. *Ayre*, 13 Com. B. 353. See *ante*, Vol. 2, 440.

If the buyer, on receiving a part of the goods sold, finds that they are not of the kind or quality which his contract entitles him to, he is not at liberty to retain such part, and claim damages for the non-delivery of the entire quantity. Nor can he require the delivery of the residue, retaining a claim for damages. He must either receive the article as it is, or he must return the portion delivered, and then enforce his claim for damages. He can recover no damages if he refuses to return the part delivered. *Shields* v. *Pettee*, 2 Sandf. (N. Y.) 262; S. C. affirmed, 4 N. Y. (4 Comst.) 122. And he is liable in such case for the price of the part retained. Id.; *Hart* v. *Mills*, 15 M. & W. 85.

Where by the contract the price is to be paid in the currency of a foreign government, but damages for a breach are to be measured by the difference between that price and the market value at a place within the United States, where there are two kinds of currency, one of gold and one of paper, the latter being the universally adopted medium, the party recovering the damages is entitled to have them estimated on the basis of the paper currency, although its value at that place is capable of being estimated in the foreign currency. *Cahen* v. *Platt*, 8 J. & Sp. (N. Y.) 483. And see *The Vaughan and Telegraph*, 14 Wall. (U. S.) 268; *Simpkins* v. *Low*, 54 N. Y. (9 Sick.) 179.

If the buyer is unable to prove the existence of any actual damage resulting from the non-delivery, he will nevertheless be entitled to recover nominal damages, on the general principle that in law every breach of a contract imports some damage. *Griffiths* v. *Perry*, 1 El. & El. 680; *Valpy* v. *Oakeley*, 16 Q. B. 941; *ante*, Vol. 2, 432, 433.

For the breach of a contract seasonably to deliver plank for a plank-road, it was held, that the measure of damages was compensation; such damage as might have been within the view of the parties. The increased expenses of putting down the plank in consequence of the delay were too remote. *Penn. R. R. Co.* v. *Titusville, etc., Co.*, 71

Penn. St. 350. And in an action to recover for the breach of a contract to sell coal at a fixed price, and deliver the same by rail in equal monthly portions, at the purchaser's expense, the measure of damages for the inferior quality of coal delivered was held to be the difference between the value at the factory of the coal called for by the contract, and that of the coal delivered; and that the measure of damages for the failure to deliver in time was not the difference in the market value, but the difference between the actual charge for freight and insurance, and the average rates during the time covered by the contract (*Merrimac Manuf. Co.* v. *Quintard*, 107 Mass. 127); and especially, in the absence of evidence that the average rates were higher than the rates at the end of the contract period. Id.

§ 6. **Damages for non-acceptance of goods.** If a contract to accept and pay for goods is broken, the same rule, as in the case of the breach of a contract to deliver, may be properly applied, for the seller may take his goods into the market and obtain the current price for them. *Barrow* v. *Arnaud*, 8 Q. B. 604. The usual measure of damages for a refusal to accept goods according to agreement is, therefore, the difference between their contract price and that at which they might have been sold to other parties on the day when the vendee was bound to receive and pay for them. *Hewitt* v. *Miller*, 61 Barb. 567; *Hall* v. *Pierce*, 4 W. Va. 107; *Sanborn* v. *Benedict*, 78 Ill. 309; *Pittsburgh, etc., Railway Co.* v. *Heck*, 50 Ind. 303; 19 Am. Rep. 713; *Davis* v. *Adams*, 18 Ala. 264. And the seller, after a tender of the goods and a refusal by the purchaser to receive them, may, if they be perishable, expensive to keep, or likely to get out of season, sell them within a reasonable time at auction, in the market of delivery, and the amount they bring will be evidence in ascertaining the damages. *Camp* v. *Hamlin*, 55 Ga. 259; *Pollen* v. *LeRoy*, 30 N. Y (3 Tiff.) 558; *Springer* v. *Berry*, 47 Me. 331; *Girard* v. *Taggart*, 5 Serg. & R. 19; *Maclean* v. *Dunn*, 4 Bing. 728. And by some of the authorities it is held, that he is not bound to give notice to the vendee of the time and place of sale, although he may be bound to give notice of his general intention to sell. See *Saladin* v. *Mitchell*, 45 Ill. 80; *Rosenbaums* v. *Weeden*, 18 Gratt. (Va.) 785; *Redmond* v. *Smock*, 28 Ind. 365. Where the vendee expresses himself as being uncertain whether or not he will accept the goods, the vendor is not obliged to sell at once, but may wait a reasonable time to allow the vendee to determine whether he will take them. *Tilt* v. *LaSalle Silk Manuf. Co.*, 5 Daly (N. Y.), 19.

Whenever the vendor gives notice to the vendee, he may recover warehouse rent for the storage of the goods, such time as would be reasonably required to enable him to resell to advantage (*M'Kenzie*

v. *Hancock*, Ry. & Mood. 436; *Chesterman* v. *Lamb*, 4 Nev. & Man. 195; 2 Ad. & E. 129); and he may recover compensation for any additional expense, loss, or injury, occasioned by the non-performance of the contract. Id. But if the vendor carries the goods to another market and sells them, it is held that he cannot recover the difference between the contract price and the net proceeds of such sale, after deducting the charges for such carriage. *Chapman* v. *Ingram*, 30 Wis. 290.

And there is said to be a distinction between ordinary wares, and paintings, statuary, railroad shares, etc., as to the application of the rule of damages, where the purchaser refuses to receive and pay for the article. As to such articles, the contract price, and not its difference from the market price at the time of the refusal, is held to be recoverable. *Gordon* v. *Norris*, 49 N. H. 376.

In an action for goods bargained and sold, the plaintiff is entitled to recover the whole value of the goods, and not merely damages for not accepting and paying for them. See *Dey* v. *Dox*, 9 Wend. 129; *Boutler* v. *Arnott*, 1 Cromp. & M. 333; *Girard* v. *Taggart*, 5 Serg. & R. 19, 32.

CHAPTER LXXV.

GOODS SOLD AND DELIVERED.

ARTICLE I.

GENERAL PRINCIPLES.

Section 1. In general. Assumpsit for goods sold and delivered lies where, upon a sale of goods, the property has passed and the goods have been delivered to the purchaser, and the price is payable at the time of action brought. See *Webb* v. *Baker*, 7 Ad. & El. 841; *Lane* v. *Thelwell*, 1 M. & W. 140; *Hart* v. *Mills*, 15 id. 85; *Waring* v. *Mason*, 18 Wend. 425. In order to maintain the action, the plaintiff must prove the contract of sale, the delivery of the goods, or such a disposition of them as will be equivalent to it, and their value. *Edmunds* v. *Wiggin*, 24 Me. 505. And see *Merrill* v. *Parker*, id. 89, 96; *Ganson* v. *Madigan*, 13 Wis. 67.

Where the terms of a contract for the sale and delivery of goods have been fully carried out by the seller, and the property in the goods has passed, and nothing remains but a duty on the part of the buyer to make payment of the price in money, the amount may be recovered, either under a general count for goods sold and delivered, or under a special count upon the contract. The basis of the action under the general count is an undertaking which the law imputes to the defendant, as a consequence of the full execution of the special agreement by the plaintiff. *Begole* v. *McKenzie*, 26 Mich. 470. The general count may also be used where the contract has not been so performed, if the vendee has actually received and appropriated the goods, or any of them; but the basis of the action in such case is quite different, and springs, not from performance of the contract, but from the actual benefit derived by the defendant through his appropriation of the plaintiff's property. Id. And see *Studdy* v. *Sanders*, 5 B. & C. 628; S. C., 8 D. & R. 603; *Streeter* v. *Horlock*, 1 Bing. 34.

Goods taken under an agreement that they may be returned within a specified time, if not found to be as represented, are sold under a "contract of sale or return," and pass to the purchaser subject to his option to return them; and if he fails to exercise that option within

the time specified, he may be sued for goods sold and delivered. *Schlesinger* v. *Stratton*, 9 R. I. 578; *Beverley* v. *Lincoln Gas-light and Coke Co.*, 6 Ad. & El. 829; *Bianchi* v. *Nash*, 1 M. & W. 545; *Moss* v. *Sweet*, 16 Q. B. 493.

If the goods are sold on trial, the person receiving them must try them within a reasonable time, and if he retains them an unreasonable time without trial, the sale may be deemed an absolute one. *McDonald* v. *Pierson*, 38 Barb. 128. And if, on trial, the article does not suit, there should be a return or an offer to return the article, or notice given to the vendor of that fact. *Smalley* v. *Hendrickson*, 5 Dutch. (N. J.) 371.

One who orders goods upon an agreement to pay for them if he is satisfied with them, must act honestly in the trial of them, and his dissatisfaction with them must be real and not pretended, to constitute a defense to an action for the contract price. *Daggett* v. *Johnson*, 49 Vt. 345.

§ 2. **What are goods, etc.** If the things sold be not goods or personal chattels, care must be taken to describe them in the declaration accordingly. Thus, under a count for goods sold and delivered, it is held that the price of trees growing (*Knowles* v. *Michel*, 13 East, 249); or of growing grass (*Stearns* v. *Washburn*, 7 Gray, 187); or of fixtures (*Lee* v. *Risdon*, 7 Taunt. 188), or the like, cannot be recovered. Id.; *Clark* v. *Bulmer*, 11 M. & W. 243; 1 Archb. N. P. 230. See, as to what are embraced in the terms "goods, wares, and merchandise," *ante*, 514, title *Goods Bargained and Sold*, § 2.

§ 3. **Delivery, how made.** To maintain the count for goods sold and delivered, it is essential that the goods should have been delivered to the defendant or his agent, etc., or that something equivalent to a delivery should have occurred. *Smith* v. *Chance*, 2 B. & Ald. 755; *Hart* v. *Tyler*, 15 Pick. 171; *Porter* v. *McClure*, 15 Wend. 189. If the goods have not been delivered, but still remain on the premises of the vendor, although packed in boxes furnished by the purchaser, the plaintiff will be nonsuited, if he has declared only for goods sold and delivered; for he should have declared for goods bargained and sold, or in a special count. *Boulter* v. *Arnott*, 1 Cromp. & M. 333; S. C., 3 Tyr. 267. And see *Thompson* v. *Maceroni*, 3 B. & C. 1; *Goodall* v. *Skelton*, 2 H. Bl. 316; *Stearns* v. *Washburn*, 7 Gray, 187; *Merrill* v *Parker*, 24 Me. 89; *Dodsley* v. *Varley*, 12 Ad. & El. 632. The mere delivery of goods by A to B will not support an action at the suit of A, for goods sold and delivered, where it appears that A was to pay B a commission upon the sale of the goods to B. *Miller* v. *Newman*, 4 Man. & G. 646. Nor is the action supported by proof of

an order by the defendant to send the goods to a certain quay, to be left till called for, without a reception and an acceptance on the part of the vendee of the goods so sent. *Anderson* v. *Hodgson*, 5 Price, 630. But where the defendant ordered the plaintiff to make a coat for him, and before it was delivered he wrote to the plaintiff to say that he did not want it, and directed the plaintiff to dispose of it for him; the plaintiff accordingly sold and delivered it to another, and informed the defendant of having done so, and the court held that this was a good delivery to the defendant, so as to enable the plaintiff to maintain an action for goods sold and delivered against him. *Gillett* v. *Finucane*, 11 Law Jour. 61; 1 Archb. N. P. 232.

There may be such a delivery as will satisfy the statute of frauds, and yet not such a delivery as will authorize the maintenance of a suit for goods sold and delivered. See *Boulter* v. *Arnott*, 1 Cr. & M. 333. Thus, delivery to and acceptance by the purchaser of any portion of the goods bargained for will satisfy the statute of frauds. Id.; *Elliott* v. *Thomas*, 3 Mees. & W. 170. But to authorize the maintenance of a suit for goods sold and delivered there must be a delivery and acceptance of all the goods sued for. *Timmons* v. *Nelson*, 66 Barb. 594; *Paige* v. *Ott*, 5 Denio, 406; *Atwood* v. *Lucas*, 53 Me. 508. See *Morse* v. *Sherman*, 106 Mass. 430; *Gammage* v. *Alexander*, 14 Tex. 414; *Millard* v. *Morse*, 32 Penn. St. 506; *Barrett* v. *Goddard*, 3 Mas. (C. C.) 107. It may, however, be laid down as a good general rule, that whatever is not a sufficient acceptance to satisfy the statute of frauds, is not a sufficient delivery to maintain this action. 1 Archb. N. P. 232.

An agreement to sell articles ready to be delivered and taken away, though still standing on the soil, unrevoked, is a sufficient delivery to give effect to the sale between the parties, notwithstanding the statute of frauds. *Ross* v. *Welch*, 11 Gray, 235.

Contracts of sale sometimes arise from the mere acceptance by the defendant of goods delivered by the plaintiff for the purpose of sale, and the value may be recovered on the count for goods sold and delivered. See *Hart* v. *Mills*, 15 M. & W. 87. But in such case the defendant must have some option to accept or return the goods, or he cannot be held liable; and where the defendant ordered goods of one person, and the plaintiff, a different person, sent the goods, and the defendant consumed the goods before he had notice that they belonged to the plaintiff, it was held that he was not liable to the plaintiff for the price, because, not having any option to return the goods to the plaintiff, he did not enter into any contract with him. *Boulton* v. *Jones*, 2 H. & N. 564. See, also, *Munro* v. *Butt*, 8 El. & Bl. 738.

Where the plaintiff delivered goods to the defendant under a special contract of sale, that the defendant should pay for the goods by a valuation to be made by two valuers, and before the valuation could be made the defendant consumed the goods and so rendered the valuation impossible, he was held liable for the value of the goods on the count for goods sold and delivered. *Clarke* v. *Westrope*, 18 Com. B. 765. And see *Bartholomew* v. *Markwick*, 15 C. B. (N. S.) 711; *Keys* v. *Harwood*, 2 Com. B. 905.

Where the goods are in the hands of a wharfinger or warehouseman, and a delivery order is given by the seller to the buyer, and the goods are accordingly transferred to the buyer's name in the books of the wharfinger, yet if any thing still remains to be done toward the completion of the contract, such as weighing, measuring, or the like, the delivery is not complete, so as to vest the property in the buyer. But after the goods have been weighed, etc., or if the quantity be sold in bulk so as not to require weighing, etc., then the property in the goods will be vested in the buyer by the delivery order and transfer; the wharfinger or warehouseman is from that time the bailee or agent of the buyer, and the delivery would be complete, so as to enable the seller to maintain the action for goods sold and delivered. *Salter* v. *Woollams*, 2 Mann. & Gr. 650; *Swanwick* v. *Sothern*, 9 Ad. & El. 895; *Tansley* v. *Turner*, 2 Bing. N. C. 151. See *Ober* v. *Carson*, 62 Mo. 209; *Wilkinson* v. *Holiday*, 33 Mich. 386; *post*, title *Sales*.

If the plaintiff, in an action for goods sold and delivered, proves a delivery at the place agreed, and that there remained nothing further for him to do, he need not show an acceptance by the defendant. *Nichols* v. *Morse*, 100 Mass. 523.

§ 4. **Price agreed upon.** Where there is an express contract, and the price of the goods form a parts of it, no question can arise, and this part of the plaintiff's case is proved by the proof of the contract. The count for goods sold and delivered can, however, be supported only where the agreement is to pay in money or by a specific chattel. *Mayor of Reading* v. *Clarke*, 4 B. & A. 268. And see *ante*, Vol. 1, title *Assumpsit*. But if there be an agreement between two tradesmen for a mutual dealing of goods for goods, or the like, the balance found due to either of them upon a settlement of accounts may be recovered by him in an action for goods sold, unless the agreement contain some express provision to the contrary. *Ingram* v. *Shirley*, 1 Stark. 185. See *Garey* v. *Pyke*, 10 Ad. & E. 512. And if the contract be for payment partly in money and partly in goods, and the latter are delivered, and the plaintiff seeks to recover the money only, he may declare on the common counts for goods sold. *Bull* v.

Parker, 2 Dowl. (N. S.) 345; *Sheldon* v. *Cox*, 5 Dowl. & Ry. 277; S. C., 3 B. & C. 420; 1 Chit. Pl. 357. So, if goods are sold and delivered by the vendor to be paid for in other goods by the purchaser, and the latter are delivered, but payment for them is enforced in money, it is held that the vendor may treat the contract as rescinded, and recover, for the goods so sold and delivered, in money. *Drew* v. *Claggett*, 39 N. H. 431; Story on Sales, § 445.

If the sale of the goods was upon credit, the count for goods sold and delivered will not lie before the credit has expired. *Ferguson* v. *Carrington*, 9 B. & C. 59; *Strutt* v. *Smith*, 1 Cr. M. & R. 312; *Hall* v. *Odber*, 11 East, 118. But it will lie after the credit has expired and the price has become immediately payable. *Helps* v. *Winterbottom*, 2 B. & Ad. 431. So, if the purchaser agrees to give security for the price of goods sold upon credit and takes away the goods purchased without doing so, the seller may maintain an action for the price before the expiration of the term of credit. *Rice* v. *Andrews*, 32 Vt. 691. A bill taken for the price of the goods has the same effect as credit in postponing the action on the common count until the bill is due (*Helps* v. *Winterbottom*, 2 B. & Ad. 431); so also has an agreement to pay by a bill. *Yale* v. *Coddington*, 21 Wend. 175; *Martin* v. *Fuller*, 16 Vt. 108. See, also, *Appleton* v. *Parker*, 15 Gray, 173; *Bass* v. *White*, 7 Lans. (N. Y.) 171. But where by agreement the goods were to be paid for by bill *or* in cash, and the purchaser paid *part* in cash, it was held that the remainder might be recovered on the common count, before the expiration of the time at which the bill would have become due. *Schneider* v. *Foster*, 2 H. & N. 4. And see *Rugg* v. *Weir*, 16 C. B. (N. S.) 471. And where the plaintiff received from the defendant, in payment for goods, a promissory note indorsed by the defendant, but not made payable to order and the note having been dishonored by the maker, it was held that the plaintiff was entitled to recover the price of the goods on a common count, notwithstanding he had omitted to give the defendant due notice of the dishonor of the note. *Plimley* v. *Westley*, 2 Bing. N. C. 249. If the bill be lost before or after it is due, no action for the price of the goods sold can, in general, be maintained. *Hansard* v. *Robinson*, 9 Dowl. & Ry. 860; S. C., 7 B. & C. 90; 1 Chit. Pl. 357.

§ 5. **Price, if there is no agreement.** If nothing has been said as to price when a commodity is sold, the law implies an understanding that it is to be paid for at what it is reasonably worth. *Acebal* v. *Levy*, 10 Bing. 376; *Valpy* v. *Gibson*, 4 Com. B. 837. A reasonable price means, such a price as the jury upon the trial of the cause

shall, under all the circumstances, decide to be reasonable. *Acebal* v. *Levy*, 10 Bing. 376. And see *post*, title *Sales*. The plaintiff, in an action for goods sold and delivered, where no price was agreed upon, must, therefore, call a witness or witnesses who know the nature of such goods and their value, and can swear that they believe them reasonably to be worth a certain price or sum. See 1 Archb. N. P. 233.

§ 6. **Waiver of tort.** In some cases where the defendant has wrongfully obtained goods of the plaintiff and has appropriated them to his own use, the plaintiff may waive the tort and claim the value of his property which the defendant has so appropriated, as a debt arising from a sale of the property, provided there are circumstances from which such a contract may be implied. *Rassell* v. *Bell*, 10 M. & W. 340, 352. See *ante*, Vol. 1, title *Assumpsit*, pp. 405–408, where the cases are fully collected.

§ 7. **Warranty of title.** The English rule as to warranty of title is thus stated by Mr. Benjamin: A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and, therefore, he warrants the title, unless it be shown by the facts and, circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold. Benj. on Sales, 523. See *Allen* v. *Hopkins*, 13 M. & W. 94; *Dickenson* v. *Naul*, 4 B. & Ad. 638; *Eichholz* v. *Bannister*, 17 C. B. (N. S.) 708. See *Bagueley* v. *Hawley*, L. R., 2 C. P. 624.

The American authorities make a distinction between goods in possession of the vendor and those not in possession. As to the former, there is an implied warranty of title (*Thurston* v. *Spratt*, 52 Me. 202; *Williamson* v. *Sammons*, 34 Ala. 691; *Davis* v. *Smith*, 7 Minn. 414; *Burt* v. *Dewey*, 40 N. Y. [1 Hand] 283; *Linton* v. *Porter*, 31 Ill. 107); but where the goods sold are in possession of a third party at the time of the sale, there is no such warranty, and the vendee buys at his peril. *Edick* v. *Crim*, 10 Barb. 445; *Huntingdon* v. *Hall*, 36 Me. 501; *Long* v. *Hickingbottom*, 28 Miss. 772; *Scott* v. *Hix* 2 Sneed (Tenn.), 192; *Lackey* v. *Stouder*, 2 Ind. 376. This distinction is repudiated in the English cases of *Pasley* v. *Freeman*, 3 T. R. 58; *Morley* v. *Attenborough*, 3 Exch. 500; and in *Eichholz* v. *Bannister*, 17 C. B. (N. S.) 708. See *Smith* v. *Fairbanks*, 27 N. H. 521.

The vendor, when liable, for a failure of title, is bound to make good to the vendee all his losses resulting from the want of a good title. *Thuston* v. *Spratt*, 52 Me. 202. In a contract for the exchange of personal property there is an implied warranty of title in the same manner as in a contract of sale. *Patee* v. *Petton*, 48 Vt. 182.

§ 8. **Warranty of quality.** As a general rule, unless there has been a warranty, false representation, or fraudulent concealment, the purchaser of property, under a completed contract, must take the property, regardless of its defects, and the seller is without liability therefor (*McClung* v. *Kelley*, 21 Iowa, 508); while, as to executory sales, the contract always carries an obligation that the article sold shall be merchantable, or at least without any remarkable defect. Id.; *Laing* v. *Fidgeon*, 6 Taunt. 108; *Hamilton* v. *Ganyard*, 34 Barb. 204. And see *Merriam* v. *Field*, 39 Wis. 578; *Fish* v. *Roseberry*, 22 Ill. 288; *Whitaker* v. *Eastwick*, 75 Penn. St. 229. So, upon the sale of an article by the manufacturer, there is an implied warranty that it will answer the purpose for which it was made. *Brown* v. *Murphee*, 31 Miss. 91. And that it is free from any latent defect growing out of the process of manufacture. *Hoe* v. *Sanborn*, 21 N. Y. (7 Smith) 552. But where there is a latent defect in the materials employed, the manufacturer will not be liable as upon an implied warranty, unless it is proved, or may legally be presumed that he knew of the defect. Id. And where the vendor merely does some additional labor on materials made or prepared by another person, the vendor will not be liable for defects in such materials unless he knew of them, or unless he makes some warranty. *Bragg* v. *Morrill*, 49 Vt. 45. See, also, *Dounce* v. *Dow*, 64 N. Y. (19 Sick.) 411. In a sale of provisions for domestic use, the vendor, at his peril, is bound to know that they are sound and wholesome; and, if they are not so, he is liable to an action, at the suit of the vendee. *Hoover* v. *Peters*, 18 Mich. 51; *Van Bracklin* v. *Fonda*, 12 Johns. 467. See *Goad* v. *Johnson*, 6 Heisk. (Tenn.) 340.

See, as to the law of warranty in detail, *post* titles *Sales* and *Warranty*.

§ 9. **Return of goods by vendee.** In the absence of a warranty express or implied, or an agreement entitling the vendee to return the goods, the contract is governed by the maxim *caveat emptor;* and the vendee can neither return the goods nor rescind the contract, nor refuse to pay the price agreed upon, merely upon the ground that they are not satisfactory, or that the bargain is a bad one. *Clare* v. *Maynard*, 7 Car. & P. 741; *Wilbur* v. *Cartright*, 44 Barb. 536; *Wheat* v. *Cross*, 31 Md 99; 1 Am. Rep. 28; *Frazier* v. *Harvey*, 34 Conn. 469; Story on Sales, § 416.

In the case of an express or implied warranty of the quality of goods, the purchaser may, without returning the goods or giving any notice to the seller, sustain an action to recover for the breach of the warranty (*Vincent* v. *Leland*, 100 Mass. 432; *Parks* v. *Morris Ax and Tool Co.*, 54 N. Y. [9 Sick.] 586; *Plant* v. *Condit*, 22 Ark. 454); or

he may recoup the damages in an action against him for the purchase price. *Muller* v. *Eno*, 14 N. Y. (4 Kern.) 597; *Houghton* v. *Carpenter*, 40 Vt. 588; *Mondel* v. *Steel*, 8 Mees. & W. 858; *Rigge* v. *Burbidge*, 15 id. 598. And it is held that the vendee may maintain an action for a breach of the warranty, without returning the property, although the vendor engages that the article may be returned, if it does not fulfill the contract. *Douglass Axe Manuf. Co.* v. *Gardner*, 10 Cush. 88; *Mandel* v. *Buttles*, 21 Minn. 391. But a sale of personal property on condition that the vendee may return the article in a specified time, becomes absolute, if the vendee so misuses the property during that time, as materially to impair its value; and, if the property has not been paid for, the vendor may recover the price in general assumpsit for goods sold. *Ray* v. *Thompson*, 12 Cush. 281. And see *Clark* v. *Neufville*, 46 Ga. 261. In cases where the vendee is authorized to return the goods, his offer to return, if made within a reasonable time, will be considered as equivalent to an actual return. *Coolidge* v. *Brigham*, 1 Mete. (Mass.) 550; *Thornton* v. *Wynn*, 12 Wheat. 192; *Towers* v. *Barrett*, 1 T. R. 136.

Where the vendor of a yoke of oxen represented them to be only seven years old, and the purchaser, on the second day after the sale, heard a farmer's opinion that they were much older, but continued five days longer to use them, and then returned them, it was held, that the right to rescind was exercised within a reasonable time. *Matteson* v. *Holt*, 45 Vt. 336.

By the terms of a warranty under which a reaping machine was sold, it was stipulated that, in case it failed to work as warranted, it was to be returned by the purchaser to a certain place, and it was held that a notification by the seller to the buyer that he would not receive the machine back, excused the buyer from making any effort to return it. *Padden* v. *Marsh*, 34 Iowa, 522. See *McCormick* v. *Dunville*, 36 id. 645.

§ 10. **Fraud in the sale by the vendor.** In case of a fraudulent misrepresentation of soundness, the vendee may stand to the bargain and recover damages for the fraud, or he may rescind the contract and return the thing bought, and receive back what he paid. *Blythe* v. *Speake*, 23 Tex. 429. And see *Bradley* v. *Bosley*, 1 Barb. Ch. 125; *ante*, title *Fraud*. So, notwithstanding his affirmance of the contract, he may *recoup* the damages sustained by him on account of the fraud in an action against him by the other party to the contract. *Whitney* v. *Allaire*, 4 Denio, 554; S. C., 1 N. Y. (1 Comst.) 305. But after such an act of affirmance he cannot maintain an action depending upon a rescission of the contract, such as trover or replevin. Id. See *Heastings* v. *McGee*, 66 Penn. St. 384; *Johnson* v. *Luxton*, 9 J. & Sp. (N. Y.) 481.

CHAPTER LXXVI.

OF GUARDIAN AND WARD.

TITLE I.

OF GUARDIANSHIP IN GENERAL.

ARTICLE I.

OF THE APPOINTMENT OF A GUARDIAN.

Section 1. In general. A guardian is "one who legally has the care and management of the person, or the estate, or both, of a child during its minority." Reeve on Dom. Rel. 311. The person who is under the care of a guardian is called a *ward*. The term "guardianship" is also applied at the present day to idiots, lunatics, spendthrifts, and the like, the guardian of such person deriving his authority from statute law and a special appointment. This guardian is frequently designated as the *committee*. See Schoul. on Dom. Rel. 389.

Guardianship of the *person* is a relation nearly allied to that of parent and child, the guardian being only a temporary parent, that is, during the time the ward is an infant, or under age. 1 Bl. Com. 460; 1 Broom & Had. Com. 327, 526, Wait's ed. Guardianship of the *estate* bears a close resemblance to trusteeship, guardians and trustees being alike bound to manage estates with fidelity and care, under the supervision and direction of the courts of chancery. Schoul. on Dom. Rel. 399.

There were three kinds of guardians at common law; namely, guardian by nature, guardian by nurture, and guardian in socage. Co. Litt. 88, b. Guardianship by nature and nurture belongs exclusively to the parents; first to the father, and, on his death, to the mother. *Hammond* v. *Cobbett*, 50 N. H. 501; S. C., 9 Am. Rep. 288; *Matthewson* v. *Perry*, 37 Conn. 435; S. C., 9 Am. Rep. 339. And the authority of such guardians extends only to the ward's person. They have no right to intermeddle with his property. *Fonda* v. *Van Horne*, 15 Wend. 631; *Miles* v. *Boyden*, 3 Pick. 213; *McKinney* v. *Noble*, 37

Tex. 731; *Kline* v. *Beebe*, 6 Conn. 494; *King* v. *Thorp*, 5 Mod. 221; *Kendall* v. *Miller*, 9 Cal. 591. The mother of a bastard child is its natural guardian. *People* v. *Mitchell*, 44 Barb. 245; *Wright* v. *Wright*, 2 Mass. 109; *Dalton* v. *The State*, 6 Blackf. (Ind.) 357; *Commonwealth* v. *Fee*, 6 Serg. & R. 255. See, also, *Alfred* v. *McKay*, 36 Ga. 440. But in Texas the putative father is allowed the guardianship of a bastard child after the mother's death. *Barela* v. *Roberts*, 34 Tex. 554. Guardianship by nurture is said to apply only to the younger children, who are not heirs apparent. See 1 Bl. Com. 461; 1 Broom & Had. Com. 327, 526, Wait's ed. And as all the children inherit equally under our laws, it would seem that this species of guardianship has become obsolete in this country, or, rather, it is merged in the higher and more durable guardianship by nature. See 2 Kent's Comm. 221; Reeve on Dom. Rel. 315; *Perkins* v. *Dyer*, 6 Ga. 401; *Macready* v. *Wilcox*, 33 Conn. 321.

A guardian *in socage* has the custody of the infant's lands, as well as of his person. *Quadring* v. *Downs*, 2 Mod. 176. At common law he only could be guardian in socage, to whom the ward's lands could not by possibility descend. See id.; *Graham* v. *Houghtalin*, 1 Vroom (N. J.), 552. This species of guardianship continued until the ward was fourteen years of age, and then ended. *Rex* v. *Sutton*, 5 Nev. & M. 353; *Byrne* v. *Van Hoesen*, 5 Johns. 66. But it would seem that if no other guardian was appointed, it continued from then until another should be appointed, or until the ward arrived at twenty-one. Id.; 2 Kent's Comm. 222; *Snook* v. *Sutton*, 5 Halst. (N.J.) 133. It is a personal trust, and is not transmissible by succession, nor devisable, nor assignable. 2 Kent's Comm. 224. A guardian *in socage* had power to lease the lands of his ward for a term as long as he continued guardian. *Emerson* v. *Spicer*, 55 Barb. 428; S. C. affirmed, 46 N. Y. (1 Sick.) 594. And he could maintain actions for injuries to the real and personal estate of the ward. *Torry* v. *Black*, 58 N. Y. (13 Sick.) 185; *Jackson* v. *De Walts*, 7 Johns. 157. Guardianship *in socage* may be considered as gone into disuse, and it can hardly be said to exist in this country, for the guardian must be some relation by blood, who cannot possibly inherit, and such a case can rarely exist. Wherever it has been recognized, it has been in a form differing materially from its character at common law. See *Fonda* v. *Van Horne*, 15 Wend. 631; 2 Kent's Comm. 224; 1 Broom & Had. Com. 526, Wait's ed.

Testamentary guardianship is founded on the deed or last will of the father, and it supersedes the claims of any other guardian, and extends to the person and real and personal estate of the child, and continues until the child arrives at full age. It is a personal trust, and

is not assignable. *Eyre* v. *Countess of Shaftsbury*, 2 P. Wms. 121; *Matter of Reynolds*, 11 Hun (N. Y.), 41. The power in the father thus to constitute a guardian by deed or will was given by the statute of 12 Charles II, ch. 24, and for this reason testamentary guardians are sometimes called *statute* guardians. 1 Bl. Comm. 462. And see *Ex parte Ilchester*, 7 Ves. 370. Testamentary guardianship has been very generally adopted in the United States (see 2 Kent's Comm. 225; *Balch* v. *Smith*, 12 N. H. 441); and, as in England, the right of testamentary appointment is still confined to the father in most of the States. See *Norris* v. *Harris*, 15 Cal. 226; *Vanartsdalen* v. *Vanartsdalen*, 14 Penn. St. 384. But the consent of the mother is required to a testamentary appointment by the father in New York (*Sackett's Estate*, 1 Tuck. 84); and in some of the States, in the absence of any direction or expressed preference by the father, as to the guardianship of an infant child, the clearly expressed wishes of the mother will be regarded, or in certain cases she may herself appoint a guardian. See *Matter of Turner*, 4 C. E. Green (N. J. Eq.) 433. The father has no testamentary power to appoint guardians for his illegitimate children (*Sleeman* v. *Wilson*, L. R., 13 Eq. 36; 1 Eng. Rep. 538); nor for children other than his own, although he gives them his property. *Brigham* v. *Wheeler*, 8 Metc. (Mass.) 127. See *Goods of Parnell*, L. R., 2 P. & D. 379. And on this subject the statute law of the particular State should be consulted.

Guardians appointed by a court of equity, or *chancery guardians*, as they are called, have essentially superseded in the English practice the other kinds; and whatever may be its origin, the power of the chancellor to appoint guardians for infants who have no testamentary or statute guardian is a branch of his general jurisdiction, which has long been firmly established. See 2 Story's Eq. Jur., § 1333; *De Manneville* v. *De Manneville*, 10 Ves. 52; *Lynch* v. *Rotan*, 39 Ill. 14. But, as a general rule, chancery guardians are appointed only where there is property; "for," as observed by Lord Eldon, "chancery cannot take on itself the maintenance of all the children in the kingdom. *Wellesley* v. *Duke of Beaufort*, 2 Russ. 21. Chancery guardianship has been adopted to some extent in this country, the supreme courts in many of our States being now possessed of full chancery powers, as in England, over the persons and estate of infants. But the greater number of guardians among us are those appointed by probate or other special courts, in conformity with statutes which regulate their powers and duties. In the absence of special provisions their rights and duties are governed by the general law on the subject of guardian and ward. And in some of the States the chancery

courts retain a general jurisdiction over every guardian, however appointed. See *Wilcox* v. *Wilcox*, 14 N. Y. (4 Kern.) 575; *Cowles* v. *Cowles*, 3 Gilm. (Ill.) 435; *Durrett* v. *Davis*, 24 Gratt. (Va.) 302.

§ 2. **Guardians, how appointed.** Guardians by nature and nurture derive their authority from the law; but this authority extends only to the custody of the person of the ward, and not to his property. See *ante*, 532, § 1. To entitle the guardian to manage the property of his ward, he must be duly appointed, by some competent public authority. *Perkins* v. *Dyer*, 6 Ga. 404; *Kendall* v. *Miller*, 9 Cal. 592. Socage guardians likewise derived their authority from the law, and not from special appointment. 2 Kent's Comm. 222. As to testamentary appointment, see *ante*, 532, § 1, and *post*, 541, § 6.

There was, at the common law, one instance of guardianship by sole appointment of the infant; namely, when the ward, at the age of fourteen, chose to supersede his guardian *in socage*, by a guardian of his own choice. 1 Broom & Had. Com. 526, Wait's ed. See *ante*, 532, § 1. But testamentary or chancery guardians cannot be superseded by the infant in this way (*Matter of Nicoll*, 1 Johns. Ch. 25); nor, in this country, should an infant be allowed to supersede a probate guardian properly appointed, unless under the authority of a positive statute. *Matter of Dyer*, 5 Paige, 534; *Lee's Appeal*, 27 Penn. St. 229. And see *Mauro* v. *Ritchie*, 3 Cranch (C. C.), 147. Infants still have, however, the privilege of nominating, though not appointing, a guardian in court, after arriving at the age of fourteen, and, if judicially sanctioned, their choice is good. See *Ex parte Edwards*, 3 Atk. 519; *Curtis* v. *Rippon*, 4 Madd. 462; *Coham* v. *Coham*, 13 Sim. 639. And throughout the United States statutes have been enacted conferring upon infants above fourteen the right of selecting their guardians, though the extent of the privilege is far from being uniformly prescribed. See *Arthur's Appeal*, 1 Grant's (Penn.) Cas. 55; *Ham* v. *Ham*, 15 Gratt. (Va.) 74; *Sessions* v. *Kell*, 30 Miss. 458; *Montgomery* v. *Smith*, 3 Dana (Ky.), 599; *Inferior Court* v. *Cherry*, 14 Ga. 594.

Subject to the qualification above stated, chancery guardians, strictly so called, and probate guardians, receive their appointment from a court having competent jurisdiction. In England, the court having jurisdiction to appoint all guardians is the court of chancery, and chancery guardians have been appointed in this country. See *Matter of Andrews*, 1 Johns. Ch. 99; *Waring* v. *Waring*, 2 Bland (Md.), 673; *Durrett* v. *Davis*, 24 Gratt. (Va.) 302; *Glasscott* v. *Warner*, 20 Wis. 654. But, in the United States, at the present day, courts having probate jurisdiction generally act in the first instance, issuing letters of guardianship as well as of administration, under their official seal. See

2 Kent's Comm. 226, and notes; Schoul. on Dom. Rel. 410, 411; *Dorman* v. *Ogbourne*, 16 Ala. 759; *Berry* v. *Johnson*, 53 Me. 401; *Herring* v. *Goodson*, 43 Miss. 392.

The usual practice in chancery, on the appointment of a guardian, is to require a master's report approving of the person and security offered. 2 Kent's Com. 227. But in some cases the court makes the appointment without reference to a master; as where the father makes the application, or the infant above fourteen selects a guardian. And this favor has been granted where the estate of the infant was very small. *Ex parte Bond*, 11 Jur. 114. It is not indispensable that the child should always be present at the hearing. *Stutely* v. *Harrison*, 1 Ir. Eq. 256. See, also, *Benison* v. *Worsly*, 15 Eng. L. & Eq. 317. The general features of the prevailing American practice in the appointment of probate guardians are thus briefly described: "Petition is presented by the person desiring the appointment, whereupon a citation is issued for all parties interested to appear on a certain court day. The judge, upon the day specified, after a summary hearing, appoints the guardian and issues letters of guardianship upon filing bond with proper security. Appeal may be taken within a limited time by any person aggrieved, and the tribunal of last resort then hears the parties, determines the choice and makes a final decree, to which the lower court conforms and issues letters of guardianship accordingly. The infant, if under fourteen, is rarely produced in court, nor does the judge make an order of reference." Schoul. Dom. Rel. 420. See, also, *Watson* v. *Warnock*, 31 Ga. 716; *Taff* v. *Hosmer*, 14 Mich. 249. And see, on the subject, the statute law of the particular State.

§ 3. **Who appointed guardian.** In the appointment of a proper person as guardian the judge is invested with a sound legal discretion, and his decision will not be disturbed on appeal, except in cases of manifest error or abuse of such discretion. Such is the English as well as the American rule. *Kayes' Case*, L. R., 1 Ch. 387; *Nelson* v. *Green*, 22 Ark. 367; *Battle* v. *Vick*, 4 Dev. (N. C.) 294; *White* v. *Pomeroy*, 7 Barb. 640; *Weeks' Appeal*, 37 Conn. 363. It is but rarely that chancery interferes with the rights of the father in such cases (*In re Fynn*, 12 Jur. 713), and only under very peculiar circumstances, and even then rather as a curator than a guardian. *Barry* v. *Barry*, 1 Moll. 210. See, also, *Spence's Case*, 2 Phillips, 247; *Ball* v. *Ball*, 2 Sim. 35. In this country, statutory provisions exist in some of the States, under which, while the father is living, probate guardians are appointed, whose powers, being limited to the infant's estate, do not conflict with the parental right to the ward's person. See

Clark v. *Montgomery*, 23 Barb. 464. But, in other States, the probate courts can only grant guardianship to fatherless children. See *Hall* v. *Lay*, 2 Ala. 529; *Stewart* v. *Morrison*, 38 Miss. 417; *Poston* v. *Young*, 7 J. J. Marsh. (Ky.) 501.

In English chancery practice but little importance is attached to the rights of the mother, if living, as to her guardianship over her fatherless children; and it is improper to appoint her without some information as to the father's family. *Cook's Case*, 6 Eng. L. & Eq. 47. Still, the court will not select guardians for infants residing with their mother until she has indicated her own wishes. *Lockwood* v. *Fenton*, 17 id. 90; *In re Thomas*, 21 id. 524. And the American rule is clearly stated to be, that the mother, and after the mother the next of kin, of an infant under fourteen years, is entitled to be appointed guardian, and that such claim cannot be disregarded unless for some satisfactory reason. *Albert* v. *Perry*, 14 N. J. Eq. 540. See, also, *Ramsay* v. *Ramsay*, 20 Wis. 507; *Lord* v. *Hough*, 37 Cal. 657; *Allen* v. *Peete*, 25 Miss. 29; *Leavel* v. *Bettis*, 3 Bush (Ky.), 74; *Morehouse* v. *Cooke*, Hopk. Ch. 226. But the right of the mother as guardian is inferior to the right of a guardian already appointed (*Macready* v. *Wilcox*, 33 Conn. 321), and this principle is, of course, applicable to remoter relatives. *Coltman* v. *Hall*, 31 Me. 196. It seems that a married woman is competent to be appointed guardian, but, before her appointment, it should be made to appear that her husband consents thereto, and that not only she, but her husband also, is a suitable person to act as guardian. *Ex parte Maxwell*, 19 Ind. 88. And see *Farrer* v. *Clark*, 29 Miss. 195; *Holley* v. *Chamberlain*, 1 Redf. (N. Y.) 333; *Jarrett* v. *State*, 5 Gill & J. (Md.) 27; *In re Kaye*, L. R., 1 Ch. 387. The appointment of an executor or administrator to be guardian is improvident and not to be encouraged. *Ex parte Crutchfield*, 3 Yerg. (Tenn.) 336; *Parker* v. *Lincoln*, 12 Mass. 17. Nor is it usual to appoint persons residing out of the jurisdiction, and in some of the States this is prohibited by statute. See *Finney* v. *State*, 9 Mo. 227. But the statute of Maine does not limit the probate court in its selection of guardians, to residents of the State. *Berry* v. *Johnson*, 53 Me. 401. And see *In re Thomas*, 21 Eng. L. & Eq. 524; *Daniel* v. *Newton*, 8 Beav. 485.

The orphans' court of Maryland has power to appoint a guardian for an infant, whose father or mother may be living at the time of the appointment, provided notice be given to such father or mother, to show cause why the appointment should not be made. *Redman* v. *Chance*, 32 Md. 42.

Under the Georgia Code, when two persons, one a relative and the

other not, apply for the guardianship of a person, all things being equal, the relative must be appointed. *Johnson* v. *Kelly*, 44 Ga. 485.

In matter of Turner, 19 N. J. Eq. 433, the guardianship of a child, for which both its paternal and maternal grandfathers had applied, was given to the latter in accordance with the wishes of its mother as shown by her will; the father, who had died earlier, having left no expression of his wishes.

Minors having real estate in Indiana may have a guardian appointed for them in the county where the real estate lies, although the minors may be non-residents. *Maxwell* v. *Campbell*, 45 Ind. 361.

§ 4. **Bond of guardian.** In chancery practice, guardians of the estate are always required to give adequate security for the faithful performance of their trust, but guardians of the person and not of the estate are, in general, exempt from this requirement. See 2 Kent's Comm. 228; *Westbrook* v. *Comstock*, Walk. (Mich.) 314; *Minor* v. *Betts*, 7 Paige, 596.

Most guardians of the estate, in this country, are, by our statute law, placed in many respects on the same footing as executors and administrators. Like the latter, they are required to give bonds, file inventories, and render regular accounts to the court. The penal amount of the bond is usually fixed at double the amount of the estate to be accounted for, and the sureties are to be approved by the court. See, generally, *Bennett* v. *Byrne*, 2 Barb. Ch. 216; *Carpenter* v. *Sloane*, 20 Ohio, 327; *Clarke* v. *Darnall*, 8 Gill & J. (Md.) 111; *Page* v. *Taylor*, 2 Munf. (Va.) 492. Where the estate of the infant is very large the court may relax the rule in relation to the amount in which a guardian and his sureties are required to justify. *Matter of Hedges*, 1 Edw. Ch. 57. Where a wife is appointed a guardian, her husband should be taken her sole bondsman only when his pecuniary resources are ample. *Ex parte Maxwell*, 19 Ind. 88. If there are several wards, one probate bond is sufficient for all. *Cranston* v. *Sprague*, 3 R. I. 205.

The Kentucky statute which provides that the judge shall be liable for any damages sustained, if he accepts such person or persons for surety on a guardian's bond as do not satisfy the court of their sufficiency, means that the judge, while sitting as a court, shall have personal knowledge that the surety offered by the guardian is sufficient, or, if he is not in possession of such knowledge, that he shall institute an inquiry on the subject. *Colter* v. *McIntire*, 11 Bush (Ky.), 565.

A probate bond is not to be avoided for slight defects committed through carelessness or error. Thus, an instrument intended as a guardian's bond may he sustained, although the names of the wards

are recited in the wrong place (*State* v. *Martin*, 69 N. C. 175); or the instrument be inartificially drawn (*Alston* v. *Alston*, 34 Ala. 15; *Probate Court* v. *Strong*, 27 Vt. 202); or if it contain more than the law requires. *Pratt* v. *Wright*, 13 Gratt. (Va.) 175. But sureties have been relieved from liability on the ground that the ward was not named in the bond at all. *Shroyer* v. *Richmond*, 16 Ohio St. 455; *Richardson* v. *Boynton*, 12 Allen, 138.

In England, testamentary guardians are not required to furnish security to the court, and the same is true in some parts of this country. See *Thomas* v. *Williams*, 9 Fla. 289. But in some of the States he is, by statute, required to give security. See Mass. Gen. Sts. C. 109. In Virginia it was held, that if two persons are appointed testamentary guardians, the office is joint and several, and either may qualify without the other, and without summoning the other to accept or renounce the guardianship. *Kevan* v. *Waller*, 11 Leigh (Va.), 414.

Although the law of Missouri recognizes the parents of a minor as the natural guardians of both his person and estate, if the minor have independent property, security must be given and an accounting be had in the same manner as though a stranger were appointed. *Duncan* v. *Crook*, 49 Mo. 116.

A probate bond renders the guardian and his sureties liable for all the estate of the ward which shall come to the possession or knowledge of the guardian. This includes chattels, and rents, and income from every species of property that the guardian actually receives in his official capacity, or that he might have received if he had faithfully performed his duties. *Bond* v. *Lockwood*, 33 Ill. 212; *Mattoon* v. *Cowing*, 13 Gray, 387; *Armfield* v. *Brown*, 73 N. C. 81; *Williams* v. *Morton*, 38 Me. 47. If the guardian ought to receive a certain amount in money, and does not, but takes something else, his own bond for instance, in the place of money, he and his sureties are liable *Avent* v. *Womack*, 72 N. C. 397. And property received from persons resident in another State is likewise covered by the bond. *McDonald* v. *Meadows*, 1 Metc. (Ky.) 507. But the sureties are not liable for property unlawfully received by the guardian, although the latter may be compelled to account for it personally. *Ballard* v. *Brummitt*, 4 Strobh. (S. C.) Eq. 171; *Livermore* v. *Bemis*, 2 Allen, 394. If, however, a guardian improvidently invests his ward's money, he and his sureties become and remain liable for any loss which may occur. *Richardson* v. *Boynton*, 12 Allen, 138. But the sureties on the bond are not liable for what the guardian receives after he has been removed from office. *Merrells* v. *Phelps*, 34 Conn. 109. And where the ward

dies, and the guardian administers upon his estate, the sureties on his administration bond become liable for the administration of all assets which he held formerly as guardian, in place of those who were his bondsmen in the guardianship. *Baker* v. *Wood*, 42 Ala. 664.

So, where a guardian has given a bond with sureties, and afterward, without a rule upon him or an order of court, requiring it, he comes into court and gives another bond with other sureties, the latter bond is valid and relates back to his appointment as guardian, and the sureties in the first bond are discharged. *Sayers* v. *Cassell*, 23 Gratt. (Va.) 525. And see *Hamner* v. *Mason*, 24 Ala. 480. But it has been held that the old sureties and the new are together liable as co-sureties for the defaults of the guardian, prior to filing the new bond, while the new sureties are alone responsible for his subsequent misconduct. *Loring* v. *Bacon*, 3 Cush. 465; *Jones* v. *Blanton*, 6 Ired. (N. C.) Eq. 115. And in cases of an additional bond being filed by the guardian, as where there has been a large accession to the original estate, both bonds remain valid, and the sureties are held liable as co-sureties. *Loring* v. *Bacon*, 3 Cush. 465; *Commonwealth* v. *Cox*, 36 Penn. St. 442. If the sureties in the first bond pay the whole amount of the guardian's deficiency equity will subrogate them to the rights of the ward, so far as to allow them to use the second bond to enforce contribution. Id. See *Frederick* v. *Moore*, 13 B. Monr. (Ky.) 470; *Sebastian* v. *Bryan*, 21 Ark. 447.

The liability incurred by the surety on a guardianship bond is not discharged by his death, but continues for the full term of the guardianship. *Moore* v. *Wallis*, 18 Ala. 458. But it would seem that the personal representative of the deceased surety may put an end to the liability, by compelling the guardian to give new security. Id. The sureties likewise continue liable for the ward's estate in the guardian's hands or subject to his control, at the time of the guardian's death. *State* v. *Thorn*, 28 Ind. 306, 310. And the liability of such sureties is not discharged by the fact that the right of action against the executor or administrator by their deceased principal is barred by the statute of limitations. *Chapin* v. *Livermore*, 13 Gray, 561. See, also, *Ashby* v. *Johnston*, 23 Ark. 163. See *ante*, Vol. 1, title *Bonds*.

§ 5. **Effect of appointment.** As soon as a guardian, duly appointed, has given a bond, the appointment is consummated, and cannot be revoked without notice to the guardian. *Isaacs* v. *Taylor*, 3 Dana (Ky.), 600. See *Harwood* v. *Boardman*, 38 Vt. 554; *Bledsoe* v. *Britt*, 6 Yerg. (Tenn.) 458. And after the guardian, by virtue of his appointment, becomes possessed of his ward's estate, he is estopped from denying the jurisdiction of the court which appointed him, and

the legality of his appointment. *Hines* v. *Mullins*, 25 Ga. 696; *Fox* v. *Minor*, 32 Cal. 111.

The appointment of a chancery guardian cannot be impeached elsewhere, nor set aside by a common-law court. See *DeManneville* v. *DeManneville*, 10 Ves. 52. Nor can letters of probate guardianship be questioned collaterally, except for fraud or excess of jurisdiction. See *People* v. *Wilcox*, 22 Barb. 178; S. C. affirmed, 14 N. Y. (4 Kern.) 575; *Warner* v. *Wilson*, 4 Cal. 310; *Kimball* v. *Fisk*, 39 N. H. 110; *Mathews* v. *Wade*, 2 W. Va. 464; *Redman* v. *Chance*, 32 Md. 42; *Lee* v. *Ice*, 22 Ind. 384; *Brigham* v. *Boston, etc., R. R. Co.*, 102 Mass. 14. And the decree of the court appointing a guardian is *prima facie*, if not conclusive, evidence of the ward's disability. *White* v. *Palmer*, 4 Mass. 147; *Leonard* v. *Leonard*, 14 Pick. 280.

§ 6. **Testamentary appointment.** See *ante*, 532, § 1. Testamentary guardians derive their authority solely from parental appointment. See *McKinney* v. *Noble*, 37 Tex. 731; *Thomas* v. *Williams*, 9 Fla. 289. And no other or further qualification is required. See *Hoyt* v. *Hilton*, 2 Edw. Ch. 202; *Brigham* v. *Wheeler*, 8 Metc. 127. By statute, however, in several of the States, a probate of the will is essential before the testamentary guardian can act; and sometimes the appointment remains subject to the approval of the court, and the person appointed is required to give due security. It is immaterial by what words the appointment is made, if the father's intent is sufficiently apparent. See *Peyton* v. *Smith*, 2 Dev. & B. (N. C.) Eq. 325; *Hagerty* v. *Hagerty*, 9 Hun (N. Y.), 175. And the appointment of guardians by a will not duly attested was made good by a codicil duly attested, written on the same paper, making certain alterations in the will, and in other respects confirming it. *DeBathe* v. *Lord Fingal*, 16 Ves. 167. But proof *aliunde* the will tending to show the testator's intention ought not to be admitted in the case of a devise of a guardianship any more than in the case of a devise of land. *Storke* v. *Storke*, 3 P. Wms. 51. See *Johnstone* v. *Beattie*, 10 Cl. & Fin. 42. As to what language is sufficient to constitute testamentary guardianship, see the following cases: *Corrigan* v. *Kiernan*, 1 Bradf. (N. Y.) 208; *Gaines* v. *Spann*, 2 Brock. 81; *Wardwell* v. *Wardwell*, 9 Allen, 518; *Miller* v. *Harris*, 14 Sim. 540. A testator may in his will authorize a surviving guardian to nominate a person in the place of a co-guardian who has died. *Goods of Parnell*, L. R., 2 P. & D. 379. And, as a general rule, letters of guardianship from the chancery or probate court add no additional force to a testamentary appointment, unless required by statute; and such letters are issued without jurisdiction, where the testamentary guardian has neither

resigned nor been removed. See *Norris* v. *Harris*, 15 Cal. 226; *Copp* v. *Copp*, 20 N. H. 284; *Robinson* v. *Zollinger*, 9 Watts (Penn.), 169. But where the testator's will prescribes that the wife shall be testamentary guardian of the children, "as long as she shall remain his widow," her authority ceases with her remarriage, and a new appointment then becomes necessary. *Holmes* v. *Field*, 12 Ill. 424.

The testator's power to appoint a guardian extends not only to his legitimate children surviving at his decease, being still minors and unmarried, but also to posthumous children. See *Ex parte Ilchester*, 7 Ves. 348. And the wife's appointment as testamentary guardian is not revoked by the birth of such issue, subsequent to the execution of the will or testamentary deed by which she was appointed. *Hollingsworth's Appeal*, 51 Penn. St. 518.

Where two persons are named in a will as "joint guardians" of the person and estate of a minor, and one of them refuses to act, all the rights and powers created by the appointment become vested in the other guardian. *Matter of Reynolds*, 11 Hun (N. Y.), 41.

If an infant has no father, nor testamentary guardian, it may devolve on chancery, or, in this country, on courts having probate jurisdiction, to appoint a guardian to any infant who has an interest in lands by descent or devise, or is entitled to a legacy, or distributive share of the personal estate of an intestate. *Mauro* v. *Ritchie*, 3 Cranch (C. C.) 147. And see *Judge of Probate* v. *Hinds*, 4 N. H. 464; *People* v. *Kearney*, 31 Barb. 430; *Gunther* v. *State*, 31 Md. 21.

§ 7. **Foreign appointment.** The rights and powers of guardians are considered as strictly local, and circumscribed by the jurisdiction of the State or government which clothed him with the office. *Morrell* v. *Dickey*, 1 Johns. Ch. 153; *Kraft* v. *Wickey*, 4 Gill. & J. (Md.) 332; *Leonard* v. *Putnam*, 51 N. H. 247; 12 Am. Rep. 106; *Woodworth* v. *Spring*, 4 Allen, 321; *Johnstone* v. *Beattie*, 10 Cl. & Fin. 42, 113, 145. Letters of guardianship granted by the courts of one State do not, therefore, operate to give the guardian a strict right to control assets of the ward situated within another State. But a court having general chancery jurisdiction over matters of guardianship may, in a proper case, and upon grounds of comity toward the courts of a foreign State, order assets of the ward in the possession of a guardian resident within its jurisdiction, to be delivered to the guardian abroad. *Earl* v. *Dresser*, 30 Ind. 11. See, on this subject, *Nugent* v. *Vetzera*, L. R., 2 Eq. 704; *M'Loskey* v. *Reid*, 4 Bradf. (N. Y.) 334; *Stuart* v. *Bute*, 9 H. L. Cas. 440; *Succession of Stephens*, 19 La. Ann. 499; *Succession of Young*, 21 id. 394.

A foreign court of equity is presumed to have acted correctly in

appointing a guardian for an infant within its jurisdiction, that being within the general powers of a court of equity, although the mother who made the application was married, and the infant was not made a party to the proceeding. *Taylor* v. *Kilgore*, 33 Ala. 214.

Where minor orphans are in fact resident in any State, the courts thereof have jurisdiction to appoint guardians of their persons while there, and of any property they may have or acquire there, whether the legal domicile of the minors is in such State or not. *Ross* v. *Southwestern R. R. Co.*, 53 Ga. 514.

As the State has no power over infants who are not resident within its borders, so, in many of the States, no court with probate jurisdiction has power to appoint a guardian for an infant who is not domiciled in its county. And letters of guardianship obtained in the wrong county are null and void, and may be collaterally impeached in any court. *Lacy* v. *Williams*, 27 Mo. 280; *Herring* v. *Goodson*, 43 Miss. 392; *Ware* v. *Coleman*, 6 J. J. Marsh. (Ky.) 198; *Sears* v. *Terry*, 26 Conn. 273. See, as to what is the infant's residence or domicile, *ante*, Vol. 2, title *Domicile*.

That the legislature may enable a foreign guardian to sell lands within the State, see *Boon* v. *Bowers*, 30 Miss. 246; *Nelson* v. *Lee*, 10 B. Monr. (Ky.) 495.

§ 8. **Appointment by operation of law.** We have seen that guardians by nature and nurture (see *ante*, 532, § 1), act under authority of the law (*ante*, 535, § 2); and that the law designates, first, the father, and, after his death, the mother, as such guardian. *Ante*, 532, § 1. The sole appointment of a married woman as guardian is held to be improper. *In re Kaye*, L. R., 1 Ch. 387. But if an unmarried woman be appointed guardian, her subsequent marriage does not terminate her guardianship (*Carlisle* v. *Tuttle*, 30 Ala. 613; 2 Wh. & Tud. Lead. Cas. 693), the marriage having the effect to join her husband with her in the discharge of the trust. *Martin* v. *Foster*, 38 Ala. 688; *Wood* v. *Stafford*, 50 Miss. 370. And if it be conceded that the husband's assent to the continuance of the guardianship is indispensable, it is held that such assent must be presumed in the absence of all evidence to the contrary. *Carlisle* v. *Tuttle*, 30 Ala. 613; *Jones* v. *Powell*, 9 Beav. 345. But see *ante*, 536, § 3; *Hardin* v. *Helton*, 50 Ind. 319. And the English rule has been, on the marriage of a mother or other female who had been appointed guardian to an infant, to appoint a new guardian, on the ground that she was no longer *sui juris*, and had become liable to the control of her husband; but she was still at liberty to go before the master and propose herself for re-appointment. *Anonymous*, 8 Sim. 346; Macphers. on Inf. 111.

ARTICLE II.

TERMINATION OF GUARDIANSHIP.

Section 1. Ward becoming of age. Guardianship regularly ceases when the ward arrives at the age of twenty-one years. *Matter of Nicoll*, 1 Johns. Ch. 25; *Jones* v. *Ward*, 10 Yerg. (Tenn.) 160. But the legal authority of guardians *in socage* terminated when the infant arrived at the age of fourteen. *Byrne* v. *VanHoesen*, 5 Johns. 66. And guardianship for nurture, as formerly distinguished from guardianship by nature, ended at the age of fourteen, in all cases. Macphers. on Inf. 60. Still, if the ward made no new choice of a guardian at fourteen, the guardianship continued during his minority. Id.; *Mendes* v. *Mendes*, 3 Atk. 624.

In Ohio, it has been held that probate guardianship expires by operation of law, when the ward reaches twelve, if a female, or fourteen, if a male, and that a new appointment must then be made. *Maxsom* v. *Sawyer*, 12 Ohio, 195; *Perry* v. *Brainerd*, 11 id. 442.

The authority of guardians over insane persons and spendthrifts ceases when the ward becomes restored to reason, or is otherwise fit to control his own person and estate; but this period should be judicially determined, and a formal discharge from the guardianship ought to be obtained. See *Kimball* v. *Fisk*, 39 N. H. 110; *Hovey* v. *Harmon*, 49 Me. 269; *Chase* v. *Hathaway*, 14 Mass. 222.

§ 2. **Election of guardians.** See *ante*, 535, art. 1, § 2. In general, a guardian judicially appointed while the minor is under fourteen is not necessarily removed at the instance of such minor when he attains that age. He can only be removed for good cause shown, and upon notice. *Dibble* v. *Dibble*, 8 Ind. 307; *Ham* v. *Ham*, 15 Gratt. (Va.) 74. See *Lee's Appeal*, 27 Penn. St. 229; *Sessions* v. *Kell*, 30 Miss. 458.

§ 3. **Death of ward.** Guardianship ceases upon the ward's death. The guardians' only remaining duty then is, to settle up his accounts and pay the balance in his hands to the ward's personal representatives. See *Norton* v. *Strong*, 1 Conn. 65.

§ 4. **Marriage of ward.** Guardianship of the *person* yields to marriage, whatever may be the sex of the ward. And the marriage of a female ward determines the guardianship both as to her person and her *estate*. *Porch* v. *Fries*, 18 N. J. Eq. 204; *Bartlett* v. *Cowles*, 15 Gray, 445; *State* v. *Joest*, 46 Ind. 235; *Burr* v. *Wilson*, 18 Tex. 367. But upon the marriage of a male ward, the guardianship continues as to his *estate*. Id.; *Brick's Estate*, 15 Abb. (N. Y.) 12; *Shutt* v. *Carloss*, 1 Ired. (N. C.) Eq. 232; *Jones* v. *Ward*, 10 Yerg. (Tenn.) 160.

In New York, it seems that an existing guardianship of a female ward is not, since the Married Women's Acts, terminated as to her *property* by marriage. *Matter of Herbeck*, 16 Abb. (N. S.) 214.

§ 5. **Resignation by death or marriage of guardian.** The office of a guardian could not be easily resigned at the common law. Having accepted the trust, the guardian ought not to be permitted to lay it down when he pleases. See *Spencer* v. *Earl of Chesterfield*, Ambl. 146; *Ex parte Crumb*, 2 Johns. Ch. 439. And under a statute of Illinois, permitting the judge "to remove guardians for good and sufficient cause," he may consider resignation a sufficient cause for removal. *Young* v. *Lorain*, 11 Ill. 624. But it is often provided, by statute, that guardians may, in the discretion of the courts, be allowed to resign.

Guardianship is determined by the death of the guardian, but a successor in the trust continues to control the ward. *Armstrong* v. *Walkup*, 12 Gratt. (Va.) 608. The license of a guardian, to enter and do certain acts upon his ward's lands, will likewise determine at the death of the guardian. *Johnson* v. *Carter*, 16 Mass. 443.

The marriage of a male guardian never terminates the guardianship, but the marriage of a female guardian may have that effect. Thus, if a testator appoints his wife to be guardian until her remarriage, her trust terminates on her marrying again. *Holmes* v. *Field*, 12 Ill. 424. And see *ante*, 543, art. 1, § 8; *Elgin's Case*, 1 Tuck. (N. Y.) 97.

§ 6. **Change of domicile.** In general, the removal of a guardian beyond the jurisdiction is a sufficient reason for severing the relation of guardian and ward, and revoking the appointment. *Cockrell* v. *Cockrell*, 36 Ala. 673; *Nettleton* v. *State*, 13 Ind. 159; *Succession of Bookter*, 18 La. Ann. 157. In North Carolina, a guardian who removes beyond the State, and takes the property of his ward out of the jurisdiction of the court, may be removed without notice. *Cooke* v. *Beale*, 11 Ired. (N. C.) L. 36. As to the power of the guardian to change the domicile of his ward, see Vol. 2, 638, 639.

§ 7. **Removal and substitution.** The broad doctrine has been laid down that chancery may remove all guardians, whether appointed by the court itself, by probate tribunals, by testament, or even by express act of the legislature, whenever it is satisfied that the guardian is abusing his trust, or the interests of the ward require it. *Cowles* v. *Cowles*, 3 Gilm. (Ill.) 435; *Disbrow* v. *Henshaw*, 8 Cow. 349. So, courts of probate jurisdiction, in the several States, likewise have authority to remove guardians of their own appointment on good and sufficient cause. See *Pickens* v. *Clayton*, 7 Blackf. 321; *In the Matter of Swifts*, 47 Cal. 629; *Re Clement*, 25 N. J. Eq. 598; *Simpson* v. *Gonzalez*, 15

Fla. 9; *Simpson* v. *Alexander*, 6 Coldw. (Tenn.) 619. And under a statute of Rhode Island, making guardians appointed by will "accountable in the same manner as if he had been appointed by the court of probate," such guardian may be removed by the probate court. *McPhillips* v. *McPhillips*, 9 R. I. 536. But a guardian cannot be removed without notice and citation to show cause. *Mauro* v. *Ritchie*, 3 Cranch (C. C.), 147. And see *Myers* v. *Pearsoll*, 17 Ind. 405; *Montgomery* v. *Smith*, 3 Dana (Ky.), 599; *Gwin* v. *Vanzant*, 7 Yerg. (Tenn.) 143. But see *Cooke* v. *Beale*, 11 Ired. (N. C.) 36; *Hovey* v. *Harmon*, 49 Me. 269. And a party in interest must apply to have a guardian removed; a mere stranger cannot make the application. *Cotton* v. *Goodson*, 1 How. (Miss.) 295. And a guardian who has been properly removed, although the mother of the ward, can claim no right to name or recommend a successor. *Hamilton* v. *Moore*, 32 Miss. 205.

The following, among other causes, have been deemed sufficient grounds for the removal of a guardian: Breach of official duties amounting to misconduct (*O'Neil's case*, 1 Tuck. [N. Y.] 34); abandonment of the trust (*Lefever* v. *Lefever*, 6 Md. 472); gross and confirmed habits of intoxication (*Kettletas* v. *Gardner*, 1 Paige, 488); bankruptcy of the guardian, or if he be guilty of fraud (*Chew's Estate*, 4 Md. Ch. 60; *Marks* v. *Witkouski*, 16 La. Ann. 341); ignorance or imprudence on the part of the guardian causing injury to the ward's interest. *Nicholson's Appeal*, 20 Penn. St. 50. In Massachusetts, conduct of a guardian tending to alienate the affection of his infant ward from its mother, who is a person of good character, is a sufficient cause for his removal from the trust. *Perkins* v. *Finnegan*, 105 Mass. 501. And by statute in Indiana, a guardian can be displaced for unfaithful performance of the trust or for giving a bond insufficient to secure his ward. *West* v. *Forsythe*, 34 Ind. 418. Under the laws of Pennsylvania, where a guardian has been appointed whose religious faith is different from that of the parents, which appointment was secured by keeping such fact secret, the appointment will be vacated upon due application for that purpose. *Re Pratt*, 1 Leg. Gaz. Rep. (Penn.) 56. And see *Nicholson's Appeal*, 20 Penn. St. 50. In some of the States guardians may be displaced wherever it is deemed for the interest of the ward. *Ex parte Crutchfield*, 3 Yerg. (Tenn.) 336. And "improper conduct" as it respects the care of the person or property of the ward is sometimes the statutory rule. *Slattery* v. *Smiley*, 25 Md. 389. And see *Windsor* v. *McAtee*, 2 Metc. (Ky.) 430.

But it is held to be no ground for the removal of a guardian, that he has retained the funds of his ward, instead of investing them, ad-

mitting his liability for interest. *Sweet* v. *Sweet*, Spears' (S. C.) Ch. 309. And intermeddling with the estate before qualifying as guardian, if done in good faith and under legal advice, is held to be no ground for removal. *Stone* v. *Dorsett*, 18 Tex. 700.

A large discretion is necessarily left to the court having original jurisdiction to remove guardians for a breach of their duties, and this discretion will not be interfered with on appeal, unless gross and palpable injustice has been done. *Isaacs* v. *Taylor*, 3 Dana (Ky.), 600; *Nicholson's Appeal*, 20 Penn. St. 50.

In Vermont, if the probate court remove a guardian, his powers immediately cease upon another person being appointed in his place, notwithstanding he may appeal from the decree removing him. An appeal, in such case, does not vacate the decree appealed from, but the custody and control of the ward and estate properly belong to the new guardian until restored to the former guardian by a decision of the appeal in his favor, or until determined in some other way. *State* v. *McKown*, 21 Vt. 503.

ARTICLE III.

GUARDIAN'S MANAGEMENT OF THE ESTATE.

Section 1. Title and authority. The guardian *in socage* was guardian both of the person and the estate of his ward, and, according to the old authorities, he had an actual estate and interest in the land, though not to his own use. Co. Litt. 90 a. And see *Byrne* v. *Van Hoesen*, 5 Johns. 66; *Torry* v. *Black*, 58 N. Y. (13 Sick.) 185; *Palmer* v. *Oakley*, 2 Doug. (Mich.) 433, 465. Testamentary guardians under the statute of Charles II, ch. 24, are likewise guardians of both person and estate, and are regarded as trustees. *Duke of Beaufort* v. *Berty*, 1 P. Wms. 703; *Gilbert* v. *Schwenck*, 14 M. & W. 488; *Mathew* v. *Brise*, 14 Beav. 341. Chancery guardians are not always guardians of both the person and estate. Where a suit is pending, a guardian of the person only is appointed, the estate being under the direction of the court. But where no suit is pending, the guardian is appointed for both person and estate. Macphers. Inf. 195. And see *Ex parte Woolscombe*, 1 Madd. 213; *Ex parte Becher*, 1 Bro. C. C. 556. Such guardian has, in all respects, the dominion *pro tempore* of the infant's estate. and possesses more than a naked authority. *People* v. *Byron*, 3 Johns. Cas. 53. The trust has been likened to that of an administrator. Id.

As it regards probate guardianship in this country, it is a general principle, that he who is appointed guardian is charged with the care

of both the person and the property of the ward (*Ten Brook* v. *McColm*, 7 Halst. [N. J.] 97); and letters of probate guardianship create a trust, coupled with an interest. *Pepper* v. *Stone*, 10 Vt. 427; *Isaacs* v. *Taylor*, 3 Dana (Ky.), 600; *Truss* v. *Old*, 6 Rand. (Va.) 556. It has, however, been said, that a guardian is the mere agent of his ward, having an authority not coupled with an interest. *Manson* v. *Felton*, 13 Pick. 206.

In general, when two or more persons are appointed guardians, and one of them dies or is removed, the trust continues to the survivor or survivors, as in the case of co-executors or co-administrators, and on the same principle. *People* v. *Byron*, 3 Johns. Cas. 53; *Pepper* v. *Stone*, 10 Vt. 427. And see *Kirby* v. *Turner*, Hopk. (N. Y.) 309. But in England, as it regards joint guardians by chancery appointment, the office, upon the death of one of them, does not, as in the case of testamentary guardianship, survive, but there must be a new appointment. *Bradshaw* v. *Bradshaw*, 1 Russ. 528. The survivors will, however, be appointed without a reference (*Hall* v. *Jones*, 2 Sim. 41), so that the rule is merely formal. See 2 Wh. & Tu. Lead. Cas. (4th ed.) 683.

The survivor of joint guardians will be presumed to have received the whole estate, in the absence of proof that the other guardian received and retained any portion thereof. *Graham* v. *Davidson*, 2 Dev. & B. (N. C.) Eq. 155.

The same person is sometimes both guardian and executor; and where this is so, it is his plain duty to keep the trusts distinct and not blend them. See *Wren* v. *Gayden*, 1 How. (Miss.) 365; *Burton* v. *Tunnell*, 4 Harr. (Del.) 424; *Wilson* v. *Wilson*, 17 Ohio St. 150; *Townsend* v. *Tallant*, 33 Cal. 45. So, a *quasi* guardianship may arise at law where there has been no regular appointment, upon the principle that any person who takes possession of an infant's property takes it in trust for the infant; and courts of equity, for the protection of the infant, will hold the person who acts as guardian strictly accountable. Equity has full jurisdiction as it regards the transactions of persons standing *in loco parentis*. *Espey* v. *Lake*, 15 Eng. Law & Eq. 579. A father (*Alston* v. *Alston*, 34 Ala. 15); a step-father (*Espey* v. *Lake*, 15 Eng. Law & Eq. 579); or one whose appointment as guardian is a nullity (*Earle* v. *Crum*, 42 Miss. 165), may be thus a *quasi* guardian. But one who is lawfully in possession of the infant's property as an executor or administrator cannot be so treated as a guardian against his consent. *Menifee* v. *Ball*, 7 Ark. 520; *Bibb* v. *McKinley*, 9 Port. (Ala.) 636.

One regularly appointed guardian of an infant is responsible for

acts done as such before he qualifies by giving a bond (*Magruder* v. *Darnall*, 6 Gill [Md.], 269); and although the guardianship terminates when the ward arrives at age, he continues personally responsible so long as he retains possession and control of the property. *Armstrong* v. *Walkup*, 12 Gratt. (Va.) 608; *Mellish* v. *Mellish*, 1 Sim. & Stu. 138.

Where one assumes to act as guardian for an infant without authority, his mistaken or fraudulent representations will not operate to create an equitable estoppel either against the infant or a subsequently appointed guardian, so as to bind the infant or to charge his estate. *Sherman* v. *Wright*, 49 N. Y. (4 Sick.) 227.

The rights of the natural guardian do not extend to the control and management of the property of the child, and a compromise by such unauthorized party would not affect the rights of the minor. *Houston, etc.*, *Railway Co.* v. *Bradley*, 45 Tex. 171.

§ 2. **Collecting ward's assets.** It is the duty of a guardian to use all reasonable means to get possession and control of his ward's personal property, and the rents and profits of his real estate, and to collect the debts or money due to his ward; and for that purpose he has power to bring the necessary actions. *White* v. *Parker*, 8 Barb. 48; *Shepherd* v. *Evans*, 9 Ind. 260. And this power exists even in respect to property fraudulently obtained from the ward before the guardian's appointment. *Somes* v. *Skinner*, 16 Mass. 348. But he should ascertain the facts of the case, before he brings suit for his ward, and if he heedlessly sues on a supposed state of facts, which in truth does not exist, he must personally bear the loss. *Savage* v. *Dickson*, 16 Ala. 257; *Brown* v. *Brown*, 5 Eng. Law & Eq. 567.

A guardian has likewise a general authority to submit to arbitration questions and controversies respecting the property and interests of his ward. *Weston* v. *Stuart*, 11 Me. 326; *Goleman* v. *Turner*, 14 Sm. & M. (Miss.) 118. And he may compromise, or release a debt due his ward, when he acts in good faith and for the ward's benefit. *Underwood* v. *Brockman*, 4 Dana (Ky.), 309; *Blue* v. *Marshall*, 3 P. Wms. 381. But in no event is an infant bound by the fraudulent compromise of his guardian. *Lunday* v. *Thomas*, 26 Ga. 537.

Whether a guardian has authority to receive notes of third persons in payment of an indebtedness to his ward, or not, if he has received the money upon the notes and appropriated it as guardian, the payment is sufficient in equity. *Jones* v. *Jones*, 20 Iowa, 388.

§ 3. **Custody of personal property.** The possession of the goods and chattels of the ward by the guardian is the possession of the ward. He acts in a merely fiduciary capacity, and is the agent of the ward in all

matters relating to the trust property. *Sallee* v. *Arnold*, 32 Mo. 532. It is his duty to place the property in a state of security. *Choses in action* should be reduced to possession without needless delay, and money temporarily in the guardian's hands should be deposited in a responsible bank for safe-keeping. So, the trust funds should be kept separate, by distinguishing marks, from the guardian's own private property; and if a guardian deposits money in a bank to his own account, and the bank afterward fails, he must bear the consequences. See *MacDonnell* v. *Harding*, 7 Sim. 178; *Wren* v. *Kirton*, 11 Ves. 377; *Matthews* v. *Brise*, 6 Beav. 239. See *Matter of Stafford*, 11 Barb. 353. But he is not responsible for funds of which he was robbed without his fault. *Atkinson* v. *Whitehead*, 66 N. C. 296.

Conversions, or changes made in the character of trust property, from personal into real or real into personal estate, are not favored, and the previous sanction of chancery should always be sought. See *Ex parte Phillips*, 19 Ves. 122; *Skelton* v. *Ordinary*, 32 Ga. 266; *Holbrook* v. *Brooks*, 33 Conn. 347. A conversion of the personal property of the ward into real estate by the guardian can only be justified by imminent necessity. *Royers' Appeal*, 11 Penn. St. 36. And see *Davis' Appeal*, 60 id. 118.

The guardian, and not the judge or clerk of the court, is the proper custodian of the moneys arising from the sale of the ward's real estate. *State* v. *Steele*, 21 Ind. 207.

§ 4. **Investing ward's money.** A guardian is bound to make his ward's funds productive, and he should, therefore, invest surplus moneys where they may draw interest. *Gary* v. *Cannon*, 3 Ired. (N. C.) Eq. 64. He is, however, allowed a reasonable time for making his investment (*Pettus* v. *Sutton*, 10 Rich. [S. C.] Eq. 356; *Worrell's Appeal*, 23 Penn. St. 44; *Owen* v. *Peebles*, 42 Ala. 338); and he may retain on hand a proper surplus to meet current and contingent expenses, and also sums which are too small to be wisely invested. *Knowlton* v. *Bradley*, 17 N. H. 458; *Baker* v. *Richards*, 8 Serg. & R. 12. Subject to such qualifications, if the guardian suffer cash balances to remain idle in his hands, or if he mingle the ward's money with his own, he will be charged with interest, and in case of misconduct, with compound interest. *Swindall* v. *Swindall*, 8 Ired. (N. C.) Eq. 285; *Stark* v. *Gamble*, 43 N. H. 465; *Knott* v. *Cottee*, 13 Eng. L. & Eq. 304; *Cook* v. *Addison*, L. R., 7 Eq. 466. See *Brand* v. *Abbott*, 42 Ala. 499; *Reynolds* v. *Walker*, 29 Miss. 250. So, the discretion of a guardian, as to the class of securities in which he may make investments, is not unlimited. As a general rule, either public securities or real securities are to be preferred. *Worrell's Appeal*, 9 Penn. St. 508;

Spear v. *Spear*, 9 Rich. (S. C.) Eq. 184; *King* v. *Talbot*, 40 N. Y. (1 Hand) 76. Investments made in the stock of railways, and other incorporated companies, whose stability is uncertain, can only be upheld under special circumstances, which ought to be made to appear by the guardian. *Allen* v. *Gaillard*, 1 S. C. (N. S.) 279; *French* v. *Currier*, 47 N. H. 88. But, in some of the States, there is no favored stock, and guardians are bound merely to exercise reasonable prudence and good faith in making investments. See *Lovell* v. *Minot*, 20 Pick. 116. Still a loan to an individual, or a single firm, without security, will not be sustained (*Clark* v. *Garfield*, 8 Allen, 427; *Gilbert* v. *Guptill*, 34 Ill. 112; *Clay* v. *Clay*, 3 Metc. [Ky.] 548); nor can the guardian himself become the surety. *Nance* v. *Nance*, 1 S.C. (N. S.) 209. So, investments made in the indorsed notes of parties of bad or doubtful standing are not sustained. *Fletcher* v. *Fletcher*, 29 Vt. 98; *Harding* v. *Larned*, 4 Allen, 426; *Hurdle* v. *Leath*, 63 N. C. 597. Though it is otherwise where the credit of the indorsers is good. *Covington* v. *Leak*, 65 N. C. 594; *Newman* v. *Reed*, 50 Ala. 297. And loans to individuals with good collateral security will be upheld. *Lovell* v. *Minot*, 20 Pick. 116. See further as to investments, *post*, title *Trusts and Trustees*.

Where a guardian has money in his hands, which he is expected to retain for a term of years, it is his duty so to invest it, that the interest will be received, at least, annually. *Huffner's Appeal*, 2 Grant's (Penn.) Cas. 341.

Testamentary guardians should follow the direction of the testator in making investments. But if there are no directions in the will, and in the absence of statutory provisions relative to investments, they must be governed by a sound discretion and good faith.

§ 5. **Payments for support and education of ward.** For the support and education of his ward the guardian need only use the ward's fortunes. He is under no obligation to employ his own means for such purpose. He may, however, render himself liable for his ward whenever he chooses to do so. And a guardian, who contracts with another person to support his ward, and does not attempt to limit the right of such person to the estate of the ward for indemnity, is himself personally liable upon such contract. *Hutchinson* v. *Hutchinson*, 19 Vt. 437. So, if a guardian sends his ward to a school, the charges for board, tuition, etc., will, in the absence of a special contract to the contrary, be upon the guardian's individual responsibility. *Salem Female Academy* v. *Phillips*, 68 N. C. 491. And see *Hargrove* v. *Webb*, 27 Ga. 172; *Oliver* v. *Houdlet*, 13 Mass. 237; *Poole* v. *Wilkinson*, 42 Ga. 539; *Cook* v. *Bennett*, 51 N. H. 85. But the guardian

may reimburse himself, in such cases, from the ward's estate. *Smith's Appeal*, 30 Penn. St. 397. And for necessaries furnished to the ward on his own account the guardian is not personally liable. Id.

A guardian has the same right to judge as to what are necessaries, according to the estate and social position of his ward, that a parent has for his own child. *Kraker* v. *Byrum*, 13 Rich. (S. C.) 163; *Caldwell* v. *Young*, 21 Tex. 800. And if a guardian, acting in good faith, refuses his consent to the ward's taking a journey undertaken only for purposes of pleasure and companionship with her friends, another person who advances money for the expenses of the journey cannot recover it from the ward, after majority, as "necessaries." *McKanna* v. *Merry*, 61 Ill. 177. See *Owens* v. *Walker*, 2 Strobh. (S. C.) Eq. 289.

A guardian must keep his expenses on account of his ward within the income of the ward's estate; and he will not be permitted to break in on the principal fund, without, upon proper proceedings, showing the necessity, and obtaining the sanction of the proper court either in advance or in ratification. *Barton* v. *Bowen*, 27 Gratt. (Va.) 849; *Gilbert* v. *McEachen*, 38 Miss. 469; *Cummins* v. *Cummins*, 29 Ill. 452; *Cohen* v. *Shyer*, 1 Tenn. Ch. 192; *Johnston* v. *Coleman*, 3 Jones' (N. C.) Eq. 290. It is the duty of guardians to keep their wards employed when able to earn their own support, rather than permit them to consume in idleness the principal of their patrimony. *State* v. *Clark*, 16 Ind. 97. But where the ward is unfit from weakness of mind or body to be bound out as an apprentice (*Johnston* v. *Coleman*, 3 Jones' [N. C.] Eq. 290); or, in case of extreme sickness, or other emergency, calling for an unusual outlay (*Long* v. *Norcom*, 2 Ired. [N. C.] Eq. 354); the courts will permit the principal to be broken upon, if the property is small and the income inadequate. Id.; *Farrance* v. *Viley*, 9 Eng. L. & Eq. 219; *In re Clarke*, 17 id. 599. So, the guardian is limited in his disbursements, not to the income of the ward's estate actually in his hands, but to the income of such estate wherever situated. *Foreman* v. *Murray*, 7 Leigh (Va.), 412.

As the father is bound to maintain his own children from his own means, he cannot, when guardian, claim the right to use the income of their property for that purpose. But if he is not able to maintain and educate his children, he is allowed to claim assistance from their fortunes, to bring them up in a becoming manner. *Newport* v. *Cook*, 2 Ashm. (Penn.) 332. And see *Clark* v. *Montgomery*, 23 Barb. 464; *Welch* v. *Burris*, 29 Iowa, 186; *Beasley* v. *Watson*, 41 Ala. 234.

§ 6. **Payment of ward's debts.** Claims against a ward need not be verified by the probate judge before they are paid by the guardian.

Racouillat v. *Requena*, 36 Cal. 651. But the guardian is not to apply property exempt from attachment or execution in satisfaction of his ward's debts. *Fuller* v. *Wing*, 17 Me. 222.

Where a debt was a charge upon the estate in the hands of the guardian of the sole heir, it was held, that the guardian might pay it by a sale under the order of the probate court, without administration. *Berry* v. *Young*, 15 Tex. 369

§ 7. **Removal of ward's property.** See *ante*, 542, art. 1, § 7. A court of equity, in a proper case, has power to order a maintenance for an infant whose person is out of its jurisdiction. 2 Story's Eq. Jur., § 1354 b. And see *Ex parte Smith*, 1 Hill's (S. C.) Ch. 140; *Ex parte Baker Andrews*, 3 Humph. (Tenn.) 592. But in permitting property to pass to the foreign guardian for this purpose, it seems that the court will exercise a discretion, and in some cases will require good security for the funds (*Martin* v. *McDonald*, 14 B. Monr. [Ky.] 437; *Carlisle* v. *Tuttle*, 30 Ala. 613); in others, a regular allowance will be directed to be paid (*McNeely* v. *Jamison*, 2 Jones' [N. C.] Eq. 186), while, in still other cases, payment will be refused altogether (*Stephens* v. *James*, 1 Myl. & K. 627), the welfare of the infant being always regarded.

§ 8. **Sales of personal property.** A guardian has power, if not restrained by statute, to sell his ward's personal estate without an order of court, and his sale will convey a good title to a *bona fide* purchaser. *Field* v. *Schieffelin*, 7 Johns. Ch. 150; *Woodward* v. *Donally*, 27 Ala. 198; *Wallace* v. *Holmes*, 9 Blatchf. (C. C.) 65; *Humphrey* v. *Buisson*, 19 Minn. 221. Indeed, it is often the duty of the guardian to sell, and he will be responsible for permitting what is liable to destruction, to waste upon his hands. See *Bank of Virginia* v. *Craig*, 6 Leigh (Va.), 399, 428. So, a guardian has power to exchange the property of his ward, which he thinks hazardous, for other property; and if his discretion has been honestly exercised in the transaction, the courts will not hold him liable for the results. *Freeman* v. *Wilson*, 74 N. C. 368.

In California, the power of the guardian to sell the personal estate of his ward without an order of court is expressly taken away by statute. *De La Montagnie* v. *Union Ins. Co.*, 42 Cal. 290.

§ 9. **Custody of real property.** The guardian has the custody of the land of the infant, and is entitled to the profits thereof for his ward's benefit. He has an interest in the estate, and may lease it, and recover in his own name, and bring trespass. He is in possession by right, and may of course maintain an action of trespass or ejectment against any person entering upon him without right. *Thacker* v. *Henderson*, 63 Barb. 271; *Truss* v. *Old*, 6 Rand. (Va.) 556; *Richard-*

son v. *Richardson*, 49 Mo. 29; *Huff* v. *Walker*, 1 Cart. (Ind.) 193. And he renders himself personally liable if he negligently permits others to collect the rents, or suffers the premises to remain unoccupied, or occupies them himself. *Hughes' Appeal*, 53 Penn. St. 500; *Clark* v. *Burnside*, 15 Ill. 62; *Hannen* v. *Ewalt*, 18 Penn. St. 9. But he is not liable for an error of judgment in having leased the lands for a less rent than could have been obtained, where he acts in good faith, first having secured the approval of the court. *McElheny* v. *Musick*, 63 Ill. 329. See *Knothe* v. *Kaiser*, 5 N. Y. Sup. (T. & C.) 4; S. C., 2 Hun, 515. A lease made by the guardian, to extend beyond the minority of his ward, is void for the excess at the election of the latter. *Rex* v. *Oakley*, 10 East, 494; *Putnam* v. *Ritchie*, 6 Paige, 390; *Richardson* v. *Richardson*, 49 Mo. 29; *Snook* v. *Sutton*, 5 Halst. (N. J.) 133. And will determine upon the death of the ward, in any event. See *ante*, 544, art. 2, § 3; *Emerson* v. *Spicer*, 46 N.Y. (1 Sick.) 594. Nor is an easement in the ward's land, granted by the guardian, of any avail beyond the limit of his guardianship. *Johnson* v. *Carter*, 16 Mass. 443; *Watkins* v. *Peck*, 13 N. H. 360. A *natural* guardian of an infant has no authority to make a lease of the lands of his ward. *May* v. *Calder*, 2 Mass. 55; *Ross* v. *Cobb*, 9 Yerg. (Tenn.) 463; *Magruder* v. *Peter*, 4 Gill & J. (Md.) 322.

Where the guardian cultivates his ward's farm instead of leasing it, he is bound to do so as a prudent farmer would cultivate his own land, and in a good husband-like manner. He is required to account for and pay a fair rental for the farm, and he is justly chargeable with whatever injury has been caused by his bad husbandry and improper cultivation. *Willis* v. *Fox*, 25 Wis. 646. He has no power to commit waste by cutting and removing timber from the land except for the ward's benefit. *Bond* v. *Lockwood*, 33 Ill. 212; *Torry* v. *Black*, 58 N. Y. (13 Sick.) 185. And if by his permission trees are cut and carried away, so that trespass cannot be maintained for the act, he must make compensation to the ward. *Truss* v. *Old*, 6 Rand. (Va.) 556. It is the duty of the guardian to keep the premises of his ward in good repair, and for this purpose he may use money in his hands to a reasonable extent. But he cannot, without an order of court, make expensive improvements of a permanent character. See *Hassard* v. *Rowe*, 11 Barb. 22; *Jackson* v. *Jackson*, 1 Gratt. (Va.) 143; *Powell* v. *North*, 3 Ind. 392; *Payne* v. *Stone*, 7 Sm. & M. (Miss.) 367; *Hood* v. *Bridport*, 11 Eng. L. & Eq. 271.

The stock and farming utensils used in carrying on the ward's farm, by the guardian, will be presumed, *prima facie*, to be the property of the ward. *Tenney* v. *Evans*, 11 N. H. 346. But if a guardian purchase

property and place it on the land of his ward, it will not belong to the ward, so that it cannot be attached as the property of the guardian, until the ward becomes of age and ratifies the transaction. *Tenney* v. *Evans*, 14 id. 343.

§ 10. **Sales of real property.** The court of chancery in England has no inherent original jurisdiction to direct the sale of the real estate of an infant. That authority is derived solely from statute. *Taylor* v. *Philips*, 2 Ves. 23; *Russel* v. *Russel*, 1 Moll. 525. Such is also the recognized doctrine in this country, and independently of an authority, derived from the legislature, the court has no right to entertain the question or direct a sale. *Rogers* v. *Dill*, 6 Hill, 415; *Jenkins* v. *Fahey*, 11 Hun, 351; *Horton* v. *McCoy*, 47 N. Y. (2 Sick.) 21, 26; *Faulkner* v. *Davis*, 18 Gratt. (Va.) 651; *Williams' Case*, 3 Bland's (Md.) Ch. 186. An act of the legislature authorizing a guardian to sell the real estate of his ward is constitutional. *Cochran* v. *Van Surlay*, 20 Wend. 365; *Thurston* v. *Thurston*, 6 R. I. 296; *Stewart* v. *Griffith*, 33 Mo. 13; *Estep* v. *Hutchman*, 14 Serg. & R. 435; *DeMill* v. *Lockwood*, 3 Blatchf. (C. C.) 56; *Boon* v. *Bowers*, 30 Miss. 246. But see *Jones* v. *Perry*, 10 Yerg. (Tenn.) 59. And the legislatures of most of the States have enacted laws to facilitate the sales of real estate by persons in a fiduciary capacity. The essential features of these statutes are similar, having the following points in common: *First*, an application to the court on behalf of the infant upon which an order of sale issues; *Second*, security to be filed by the guardian; *Third*, a formal sale of the land; *Fourth*, the execution of the deed; and *Fifth*, the disposition of the proceeds. See Schoul. Dom. Rel. 483; *Ryder* v. *Flanders*, 30 Mich. 336; *Bobb* v. *Barnum*, 59 Mo. 394; *Spellman* v. *Mathewson*, 65 Ill. 306; *Lyon* v. *Vanatta*, 35 Iowa, 521. In some other States a confirmatory order of the court is necessary to give validity to the sale. See *Penn* v. *Heisey*, 19 Ill. 295; *People* v. *Circuit Judge*, 19 Mich. 296. But see *Stall* v. *Macalester*, 9 Ohio, 19. And the provisions of the statute authorizing the sale of the real estate of infants must be strictly complied with (*Woodcock* v. *Bowman*, 4 Metc. [Ky.] 40.), or the sale will be void. *Shanks* v. *Seamonds*, 24 Iowa, 131; *Pendleton* v. *Trueblood*, 3 Jones' (N. C.) L. 96; *Jenkins* v. *Fahey*, 11 Hun, 351. As to the precise mode of procedure, see the statutes of the particular State.

In general, proceedings by a guardian to sell real estate for the maintenance of the ward are purely *in rem*. No parties are necessary. It is *ex parte* in the name of the guardian, on behalf of the ward, after notice to all concerned. *Mulford* v. *Beveridge*, 78 Ill. 455; *Williams* v. *Williams*, 18 Ind. 345.

ARTICLE IV.

CUSTODY AND CARE OF THE PERSON.

Section 1. In general. The rights and duties of a guardian as it concerns the person of his ward, are, in general, those of a parent. He has a right to the custody of the ward, and it is his duty to maintain, protect and educate the ward in a style suitable to the latter's means and condition in life. See *ante*, 551, art. 3, § 5.

§ 2. **Custody of ward.** The appointment of a guardian is said to be a final decision upon the right to the care and control of the person of the ward. *Senseman's Appeal*, 21 Penn. St. 331. It is therefore held, that the guardian may insist upon taking the child from the control of a relative, or any other person, to whom the father has informally committed its care. *Bonnell* v. *Berryhill*, 2 Cart. (Ind.) 613; *Coltman* v. *Hall*, 31 Me. 196; *Ex parte Ralston*, 1 R. M. Charlt. (Ga.) 119.

But a court of equity possesses a controlling and superintending power over all guardians, whether testamentary, or those appointed by probate tribunals. *People* v. *Wilcox*, 22 Barb. 178; S. C. affirmed, 14 N. Y. (4 Kern.) 575. And it will exercise that power by taking the ward from the guardian, and delivering it to its mother, or some other person, whenever the interest of the ward requires it. Id.; *Ward* v. *Roper*, 7 Humph. (Tenn.) 111. So, while confirming the guardian's right of custody, chancery will grant access in certain cases, to the mother or other near relative of the infant. *Ex parte Ralston*, 1 R. M. Charlt. (Ga.) 119; *Ord* v. *Blackett*, 9 Mod. 116.

Where a ward is forcibly removed by the parent from the possession of the guardian, the court cannot entertain jurisdiction of a writ of *habeas corpus*, to restore the ward to the guardian, unless the child is actually restrained of his liberty. *Foster* v. *Alston*, 7 Miss. 406.

§ 3. **Changing ward's residence.** See *ante*, Vol. 2, title *Domicile*. It is clear that the surviving parent, being also the guardian, may change the ward's domicile from one State or country to another. *Potinger* v. *Wightman*, 3 Mer. 67; *Holyoke* v. *Haskins*, 5 Pick. 20. And it seems that a guardian, as such, has undoubted authority to change the residence of his ward from one portion of the same sovereignty to another, as, for instance, from one county to another, within the same State. *Ex parte Bartlett*, 4 Bradf. (N. Y.) 221. It has, however, been doubted, whether a guardian, as such, not being also a parent, has authority to change his ward's domicile from one country or State to another. *School Directors* v. *James*, 2 Watts & Serg. (Penn.) 568. See, also, Story on Confl. of Laws, §§ 494, 504. And it is held to be the set-

tled law in Alabama, that, if the father dies, his last domicile continues that of the infant children; and that the guardian cannot change the domicile acquired by the ward at the place of his birth, or derived from his father at his death. *Daniel* v. *Hill*, 52 Ala. 430. And see *Woodworth* v. *Spring*, 4 Allen, 321. But, according to the weight of authority, both English and American, a guardian, as such, may change the residence of his ward from one State or country to another, when that change will be for the benefit of the ward. And this, though it may change the nature of the succession of the infant's estate should he die in his new domicile; but the least suspicion of fraud in such case will be carefully scrutinized. *Townsend* v. *Kendall*, 4 Minn. 412; *Nugent* v. *Vetzera*, L. R., 2 Eq. Cas. 704; *Pedan* v. *Robb*, 8 Ohio, 227; *Wood* v. *Wood*, 5 Paige, 596, 605; Story on Confl. of Laws, § 506; 2 Kent's Com. 227, note *b*.

§ 4. **Ward's services.** It is said that the guardian is not entitled to the earnings of the minor, as the father is. The guardian's trust is one of obligation and duty, and not of speculation and profit. The person of the ward cannot be used solely to the advantage of the guardian; if, therefore, he is hired out or apprenticed, and a premium paid by the master, it has been held that the ward would be entitled to recover the hire or premium. *Bass* v. *Cook*, 4 Port. (Ala.) 390. See *Denison* v. *Cornwell*, 17 Serg. & R. 377; *Bannister* v. *Bannister*, 44 Vt. 624. Although a guardian has authority to bind out his ward as an apprentice (*Denison* v *Cornwell*, 17 Serg. & R. 377), he is not responsible to the master for a breach of contract by the apprentice, unless the statute makes him so. *Velde* v. *Levering*, 2 Rawle (Penn.), 269.

At common law, the guardian could recover damages for his ward in trespass, and by statute of Westm. 11, ch. 35, he was given a writ of ravishment of ward, by means of which he was enabled to recover the body of the heir as well as damages. Bac. Abr., Guardian (F). And upon the principle that the equity of this statute extends to other guardians, as well as to guardians *in socage*, it has been held, that a guardian may maintain an action and recover damages for the seduction of his female ward. *Fernsler* v. *Moyer*, 3 Watts & Serg. 416. See *Certwell* v. *Hoyt*, 6 Hun (N. Y.), 575; *Ball* v. *Bruce*, 21 Ill. 161. But it has been held that a guardian cannot, as such, maintain an action for the seduction of his ward. *Blanchard* v. *Ilsley*, 120 Mass. 487; 21 Am. Rep. 535.

§ 5. **Education of ward.** The guardian is the proper judge of the place where his ward shall be educated, and it is said that courts of chancery will assist guardians in compelling their wards to go to the

schools selected by the guardian. Story's Eq. Jur., § 1340; *Hall* v. *Hall*, 3 Atk. 721. As to the particular mode of education, the court will receive parol proof of the intent of the father, receiving all kinds of evidence to govern their direction. *Anonymous*, 2 Ves. Sen. 56; *Campbell* v. *Mackay*, 2 Myl. & Cr. 31, 34; *In re Newbery*, L. R., 1 Ch. App. 263. But see *Storke* v. *Storke*, 3 P. Wms. 51. And see, as to the abandonment by the father of his right to control his children's education, *Andrews* v. *Salt*, 8 Ch. App. 622; S. C., 6 Eng. R. 536.

Where a ward is in the habit of harboring persons of bad and vicious character about his premises, the guardian is authorized to warn such persons to leave the premises, and on their refusal, he may cause them to be forcibly expelled. *Wood* v. *Gale*, 10 N. H. 247.

ARTICLE V.

GUARDIAN'S LIABILITY ON CONTRACTS AS GUARDIAN.

Section 1. In general. We have seen that a guardian is not personally responsible for the support and education of his ward, unless he consents to become bound. *Ante*, 551, art. 3, § 5. But he may bind himself personally for the debt of his ward (see id.; *Young* v. *Smith*, 22 Tex. 345); and the promise of a guardian to pay a debt contracted by his ward is an original, and not a collateral, undertaking within the statute of frauds, and need not, therefore, be expressed in writing. *Roche* v. *Chaplin*, 1 Bailey (S. C.), 419. See, also, *French* v. *Thompson*, 6 Vt. 54; *Hutchinson* v. *Hutchinson*, 19 id. 437.

§ 2. **Contracts as to real estate.** A guardian may execute deeds and other writings in the course of his trust, but they should be signed in the name of his ward. *Hunter* v. *Dashwood*, 2 Edw. Ch. 415. See *Cole* v. *Gourlay*, 9 Hun (N. Y.), 493. And, although it seems that guardians cannot be held liable on implied covenants merely (see *Webster* v. *Conley*, 46 Ill. 13), yet a guardian is held personally liable for unauthorized stipulations inserted by him in a deed, and also for authorized covenants so worded as not to bind the ward's estate. *Young* v. *Lorain*, 11 id. 624; *Whiting* v. *Dewey*, 15 Pick. 428.

Where a guardian, by mistake, included in a deed of land of his ward, one lot to which the ward had no title, and for himself, as well as his ward, etc., entered into covenants of title with respect thereto,—it was held, that he was liable personally to the grantees for a breach of these covenants. *Holyoke* v. *Clark*, 54 N. H. 578.

A guardian, who purchases a house and lot expressly subject to the payment of the balance of a mortgage given to his vendor, incurs a

personal responsibility to the amount of the unpaid mortgage, though the purchase was made by the sanction and direction of the court. *Woodward's Appeal*, 38 Penn. St. 322.

The contract of a guardian to sell the real estate of his minor ward, although in writing, made when he has no authority to sell, is illegal and void. *Worth* v. *Curtis*, 15 Me. 228. And a deed, by a *feme* guardian of infants, of the right of such infants in land, does not convey the guardian's right of dower. *Jones* v. *Hollopeter*, 10 Serg. & R. 326.

§ 3. **Contracts as to personal estate.** If a guardian, in his representative capacity, makes a contract or covenant which he has no right to make, and which is not binding upon his ward, he is personally bound to make it good. *Mason* v. *Caldwell*, 10 Ill. 196. But an adoption of his act will relieve him from responsibility, provided the adoption be made by one competent to act, and with a full knowledge of all the facts connected with the transaction. *Worrell's Appeal*, 23 Penn. St. 44.

An investment in bank stock by a guardian, *in his own name*, even though he is expressly authorized to invest in such stock, renders him personally liable for the amount invested. *Stanley's Appeal*, 8 Penn. St. 431. And a guardian who takes a note payable simply to himself, with no words to indicate that he takes it as guardian, cannot, after the maker has gone into insolvency, show that it was taken on account of his ward's estate. *Knowlton* v. *Bradley*, 17 N. H. 458. And see *United States* v. *Bender*, 5 Cranch (C. C.), 620.

But a guardian who takes a bond without security is not liable, provided he acts with common skill, common prudence, and common caution. *Konigmacher* v. *Kimmel*, 1 Penr. & W. (Penn.) 207; *Dietterich* v. *Heft*, 5 Penn. St. 431. And where a guardian invests the funds of his ward in a concern, whose operations are based partly on cash and partly on credit, he is only chargeable with that portion of the profits, if it can be ascertained, which shall accrue on the cash investment. *Kyle* v. *Barnett*, 17 Ala. 306.

§ 4. **Liability for moneys received.** See *ante*, 549, art. 3, §§ 2 and 3. A guardian is not liable for money paid to him, as such, where he has paid it over to the ward before notice of the mistake. *Massey* v. *Massey*, 2 Hill's (S. C.) Ch. 492. And a testamentary guardian not entitled to receive the principal or interest of money will not be held liable for the executor's insolvency. *Johnson's Appeal*, 12 Serg. & R. 317.

Where a *feme covert* received money on account of infants, of whom she and her husband were joint guardians, which was not applied for the use of the infants, but of the application of which to her own sepa-

rate use there was no evidence, the husband's estate was considered the debtor therefor. *Gardner* v. *Gardner*, 7 Paige, 112.

ARTICLE VI.

GUARDIAN'S LIABILITY FOR WASTE OR NEGLIGENCE.

Section 1. Waste. See *ante*, 553, art. 3, § 9. A guardian is liable for waste committed or suffered by him upon the lands of his ward. Id.; *Williams* v. *Barrett*, 2 Cranch (C. C.), 673. And see *Kincaird* v. *Scott*, 12 Johns. 368. And whatever tends to the destruction of the inheritance, or to its depreciation in value, is considered by the law as waste; and waste may be committed of land as well as in houses and timber. *Wilds* v. *Layton*, 1 Del. Ch. 226. In this country, whether the cutting of any kind of trees is waste, is said to depend upon the question whether the act is such as a prudent farmer would do, having regard to the land as an inheritance, and whether the doing of it would diminish the value of the land as an estate. 1 Washb. on Real Prop. 108. And where a guardian cut the trees upon six acres belonging to his wards, it appearing that they were of no great value, and that the cutting of them did not diminish the value of the land, and the guardian accounted for what he received for the wood, it was held, that he was not chargeable with waste. *Bond* v. *Lockwood*, 33 Ill. 212.

Equity will hold guardians liable for the trust fund, if they make use of it or mingle it with their own money (*Clay* v. *Clay*, 3 Metc. [Ky.] 549); or lend it upon insufficient security, and the borrower becomes insolvent. *Smith* v. *Smith*, 4 Johns. Ch. 281; *ante*, 550, art. 3, § 4. So, if a guardian consent to his co-guardian's misapplication of his ward's money, he is liable (*Pim* v. *Downing*, 11 Serg. & R. 66); but it is otherwise, if he had no agency in such misapplication. *Kirby* v. *Turner*, Hopk. (N. Y.) 309.

The fraud of a guardian in disposing of the property of his ward is not sufficient of itself, under all circumstances, to invalidate his transactions with innocent parties. See *Hunter* v. *Lawrence*, 11 Gratt. (Va.) 111.

§ 2. **Negligence.** A guardian is bound to use ordinary prudence and diligence in the management of his ward's estate, and is liable for losses incurred through culpable indifference and negligence. *Potter* v. *Hiscox*, 30 Conn. 508; *Royers' Appeal*, 11 Penn. St. 36; *Taylor* v. *Hite*, 61 Mo. 142. If he loans his ward's money, and takes a bond signed by a principal and surety and the principal is solvent, but the surety is doubtful, he will be held liable if the money is lost. *Hurdle*

v. *Leath*, 63 N. C. 597. So, if he brings a suit in his ward's name, where no cause of action exists, he is personally chargeable with the costs, although he may have acted under the advice of counsel. *Savage* v. *Dickson*, 16 Ala. 256. And where guardians take a mortgage on property estimated to be worth $3,500, to secure a debt due their ward of about $2,000, and permit it to be sold at public sale for $540, they are guilty of such negligence as will make them responsible to their ward for the loss. *McLean* v. *Hosea*, 14 Ala. 194.

§ 3. **Laches.** See *ante*, 549, art. 3, § 2. A guardian will be held liable for his *laches* in enforcing his ward's rights. See *Scott* v. *Carruth*, 9 Yerg. (Tenn.) 418. And proof that the infant ward requested the guardian to abstain from recovering a demand against a debtor is no defense to an action for the omission to make the collection. *Johnston* v. *Miller*, 5 T. B. Monr. (Ky.) 205.

A guardian may bring suit in behalf of his ward, for the latter's equitable choses in action. Where, therefore, as to such choses, the guardian is barred by the statute of limitations, the infant, in the absence of collusion, is barred also, as against strangers, and his remedy is against the guardian. *Long* v. *Cason*, 4 Rich. (S. C.) Eq. 60.

ARTICLE VII.

GUARDIAN'S RIGHTS AND PRIVILEGES.

Section 1. Reimbursement. See *ante*, 551, art. 3, § 5. A guardian should be allowed for necessary, proper, and economical disbursements, made for the benefit of his ward (id.; *Ware* v. *Owens*, 42 Ala. 212); and this, without the previous direction of the court, and notwithstanding the ward's estate consists of unproductive lands. *Jarrett* v. *Andrews*, 7 Bush (Ky.), 311. And where the guardian advances his own money, in payment of debts or expenses of his ward, he is entitled to interest. *Hayward* v. *Ellis*, 13 Pick. 272.

But a guardian who advances money for his ward over and above the income of his estate, in order to set him up in business, without applying to the court for leave, cannot charge his ward with it. *Shaw* v. *Coble*, 63 N. C. 377. See, also, *Hassard* v. *Rowe*, 11 Barb. 22. Nor can a guardian recover for the board of his ward when the ward's services are worth as much as the board. *Hayden* v. *Stone*, 1 Duv. (Ky.) 396. So, it is held, that when a guardian takes his ward into his own family, an intention to maintain such ward gratuitously may be inferred from circumstances. *Crosby* v. *Crosby*, 1 S. C. 337. See,

also, *Folger* v. *Heidel*, 60 Mo. 284. But see *Armstrong* v. *Walkup*, 9 Gratt. (Va.) 372.

A father who is guardian of his infant children can charge their estate with the expense of their maintenance, only where he has not sufficient means for their support, and with the sanction of the court. *Walker* v. *Crowder*, 2 Ired. (N. C.) Eq. 478.

§ 2. **Compensation.** In England, the services rendered by guardians are treated as honorary and gratuitous. Chancery makes no allowance beyond a reimbursement for the necessary expenses actually incurred. See 2 Story's Eq. Jur., § 1268. The English rule has never been adopted in this country, and a guardian, as long as he remains the rightful bailiff of the ward's property, is entitled to reasonable allowances as a trustee. Id.; *McNickle* v. *Henry*, 9 Phil. (Penn.) 243; *Emerson's Appeal*, 32 Me. 159; *Mc Elhenny's Appeal*, 46 Penn. St. 347. But a guardian should be allowed no compensation where he has neglected his duties, and done his ward positive wrong. *Mc Cahan's Appeal*, 7 Penn. St. 56; *Reed* v. *Ryburn*, 23 Ark. 47. Nor will he be allowed compensation for taking care of the trust fund while he himself is the borrower of it. *Farwell* v. *Steen*, 46 Vt. 678. And a guardian, who renders the ward services of a professional or personal character, cannot charge his ward's estate for them, but is restricted to the statutory allowance of a guardian. *Morgan* v. *Hannas*, 49 N. Y. (4 Sick.) 667; S. C., 13 Abb. (N. S.) 361; reversing S. C., 39 Barb. 20.

§ 3. **Commissions.** In some of the States, the statute allows the guardian what the court may deem just and reasonable. See *Roach* v. *Jelks*, 40 Miss. 754; *Emerson's Appeal*, 32 Me. 159; *Evarts* v. *Nason*, 11 Vt. 122; *Rathbun* v. *Colton*, 15 Pick. 471; *State* v. *Foy*, 65 N. C. 265; *Matlock* v. *Rice*, 6 Heisk. (Tenn.) 33. In other States, custom or local law has established a commission as the guardian's compensation. See *Matter of Roberts*, 3 Johns. Ch. 43; *Holcombe* v. *Holcombe*, 2 Beasl. (N. J.) 415; *Armstrong* v. *Walkup*, 12 Gratt. (Va.) 608, *Allen* v. *Martin*, 34 Ala. 442; *Cartledge* v. *Cutliff*, 29 Ga. 758.

A guardian may engage the services of a clerk or agent and charge the estate with the expense, where, from the peculiar nature or situation of the property, such services will be beneficial. *Vanderheyden* v. *Vanderheyden*, 2 Paige, 287; *Neilson* v. *Cook*, 40 Ala. 498; *Reed* v. *Ryburn*, 23 Ark. 47. But a person who is both trustee and guardian is not entitled to full compensation in each capacity, for the same service. *Blake* v. *Pegram*, 101 Mass. 592.

ARTICLE VIII.

ACCOUNTING.

Section 1. Obligation to account. A guardian must account for all the property which he receives as belonging to the ward, and he is not permitted to contest the title of the ward to the property. *McAlister* v. *Olmstead* 1 Humph. (Tenn.) 210. So, his bond binds him, and his estate after his death, to account for interest and profits received by him, so long as his possession of the property continues, though his authority as guardian may cease meanwhile. But after the termination of his authority he will only be held to account on the principles which govern accounts between debtor and creditor. *Armstrong* v. *Walkup*, 12 Gratt. (Va.) 608. See *Swan* v. *Dent*, 2 Md. Ch. 111; *Gilbert* v. *Guptill*, 34 Ill. 112; *Peck* v. *Braman*, 2 Blackf. (Ind.) 141.

Parties who assume to act as the guardians of infants, without authority, or under an appointment which is void for want of jurisdiction in the court by which it was granted, become liable as trustees *in invitum*, and may be made to account in a court of equity. *Chaney* v. *Smallwood*, 1 Gill (Md.), 367; *Corbitt* v. *Carroll*, 50 Ala. 315.

§ 2. **Jurisdiction.** In England, guardians' accounts are under the direction of the court of chancery. So, courts of equity in this country entertain jurisdiction as to such accounts. See *Chaney* v. *Smallwood* 1 Gill (Md.), 367; *Hill* v. *McIntire*, 39 N. H. 410; *Commonwealth* v *Henshaw*, 2 Bush (Ky.), 286; *Townsend* v. *Kendall*, 4 Minn. 412; *Moore* v. *Hood*, 9 Rich. (S. C.) Eq. 311. And see *ante*, Vol. 1, 174. But under our statutes probate guardians, duly appointed, are made liable to account, in the first instance, to the local court issuing letters of guardianship. See *Modawell* v. *Holmes*, 40 Ala. 391; *Reynolds* v. *Walker*, 29 Miss. 250; *Manning* v. *Baker*, 8 Md. 44; *Yeager's Appeal*, 34 Penn. St. 173; *Brent* v. *Grace*, 30 Mo. 253.

A court of law is not the proper jurisdiction to ascertain the final balance of an unsettled guardian's account, although, when once settled, the jurisdiction for its recovery may be clear. *Sebastian* v. *Bryan*, 21 Ark. 447.

Where a guardian holds the same appointment from two States, he is required to account for the money received for his ward, in that State only in which the transaction took place. *Smoot* v. *Bell*, 3 Cranch (C. C.), 343.

§ 3. **Who may require.** In chancery, guardians as officers of the court are compelled to present their accounts on application made by any person interested. The proceedings are by petition, or on motion

filed. *In re Burke*, 1 Ball & B. 74. But a person, after becoming of age, cannot call his former guardian to an account by petition. It must be done by bill. *Matter of Hopson*, 1 Edw. Ch. 8. And there is said to be scarcely an instance in modern times of an account being taken against a guardian without suit. Macphers. on Inf. 259. In a suit for taking a guardian's accounts, persons interested in their taking are necessary parties. *Taylor* v. *Taylor*, 6 B. Monr. (Ky.) 559; *Keeler* v. *Keeler*, 11 N. J. Eq. 458; *Hendry* v. *Clardy*, 8 Fla. 77.

The wife is a necessary party to a proceeding to compel a final settlement of her guardianship of a minor child, and a decree against her husband only is erroneous. *McGinty* v. *Mabry*, 23 Ala. 672.

Any person in interest may compel the guardian to account, although years may have elapsed since the termination of the guardianship, and notwithstanding the guardian has a receipt in full from the ward. *Gilbert* v. *Guptill*, 34 Ill. 112; *Wade* v. *Lobdell*, 4 Cush. 510; Schoul. Dom. Rel. 497. Mere lapse of time cannot be set up against a trust, except that the usual limitation to suits on specialties might determine the remedies of parties aggrieved as against the guardian and his sureties. Id.; *Bard* v. *Wood*, 3 Metc. (Mass.) 74; *Crain* v. *Barnes*, 1 Md. Ch. 151. See *Marr's Appeal*, 78 Penn. St. 66.

§ 4. **Inventory.** One of the first duties of a guardian judicially appointed is to file an inventory of his ward's effects; and the inventory serves as the basis of the guardian's accounts and primarily fixes his liability. See *Markel* v. *Phillips*, 5 Ind. 510; *Matter of Seaman*, 2 Paige, 409; *Clark* v. *Whitaker*, 18 Conn. 543. Still it is not conclusive evidence of the existence of assets, nor of their true valuation. And the guardian is permitted to show on accounting that he is not chargeable with certain items therein appearing, or that property realized less than its appraised value, and he will be credited accordingly. He must, however, account for property coming within his reach in any manner, and for all gains over and above the appraisers' valuation, but not included in the inventory. And it has been held that he must return in his inventory an indebtedness due by him to the ward, which accrued prior to his appointment as guardian. *Neill* v. *Neill*, 31 Miss. 36.

§ 5. **Mode of accounting.** Transactions between a guardian and ward during his minority are alone the subjects of settlement in a guardianship account. *Crowell's Appeal*, 2 Watts (Penn.), 295. But it is no objection that a guardian's account is settled after the ward's majority, provided it embraces only what accrued during minority. *Woodbury* v. *Hammond*, 54 Me. 332.

With probate guardians in this country it is the usual practice to pre-

sent their accounts from time to time pending the minority of the ward. Perhaps, in most of the States, accounts are rendered annually; in others tri-ennially, or as otherwise directed by the court. See *Diaper* v. *Anderson*, 37 Barb. 168; *Yeager's Appeal*, 34 Penn. St. 173. But a distinction is to be observed between such accounts and the final account. The accounts rendered by a guardian from time to time during the minority of his ward, and approved by the court, are only *prima facie* correct, and do not bind the ward when he is able to show they are erroneous or fraudulent. *Willis* v. *Fox*, 25 Wis. 646; *Ashley* v. *Martin*, 50 Ala. 537; *Matlock* v. *Rice*, 6 Heisk. (Tenn.) 33; *Kidd* v. *Guibar*, 63 Mo. 342. But the final account, rendered by the guardian at the expiration of his trust, once examined and approved by the court, concludes all parties interested, and cannot, as a general rule, be reopened in any court. See *Brent* v. *Grace*, 30 Mo. 253; *Allman* v. *Owen*, 31 Ala. 167; *State* v. *Strange*, 1 Cart. (Ind.) 538; *Stevenson's Appeal*, 32 Penn. St. 318; *Seaman* v. *Duryea*, 11 N. Y. (1 Kern.) 324.

When the items of credit in a guardian's account current are objected to and contested on his final settlement, they should not be allowed, unless supported by proper vouchers and sufficient proof of their correctness. *Newman* v. *Reed*, 50 Ala. 297. And where a guardian seeks an allowance of his account, in which the expenditures exceed the income of his ward's estate, he must show as strong a case as would have been necessary to obtain an order of the court allowing such excess of expenditures. *Holmes* v. *Logan*, 3 Strobh. (S. C.) Eq. 31.

If the cost of maintaining and educating infant wards exceeds their annual income until they become of an age to render service equal to their support, the surplus of expenditures during the former period ought to be set off against the income of their estates during the latter period, until they attain their majority. *Myers* v. *Wade*, 6 Rand. (Va.) 444.

§ 6. **Charges and credits.** See *ante*, 551, art. 3, § 5; also *ante*, 561, art. 7. In general, the allowance to guardians for the support, maintenance and education of infants, is limited to the amount of interest, rents, hires, or other profits of the estate of the infants; and it will require very special circumstances to justify a departure from this rule. *Calhoun* v. *Calhoun*, 41 Ala. 369; *Jackson* v. *Jackson*, 1 Gratt. (Va.) 143; *Johnston* v. *Haynes*, 68 N. C. 514; *Speer* v. *Tinsley*, 55 Ga. 89. So, it is a strong implication of law, that guardians shall be allowed to charge against their wards, such disbursements and expenses only as are reasonable and suitable to their circumstances. *Freeman* v. *Tucker*, 20 Ga. 6. And a guardian will be allowed nothing for services ren-

dered, or expenses incurred, by him, previous to his appointment as guardian. *Clowes* v. *Van Antwerp*, 4 Barb. 416; S. C. affirmed, 6 N. Y. (2 Seld.) 466. And if he make a gratuity to his ward, he cannot afterward charge the amount to him. *Pratt* v. *McJunkin*, 4 Rich. (S. C.) 5. But a guardian has been allowed *bona fide* expenses incurred by him in removing his ward to another State. *Cummins* v. *Cummins*, 29 Ill. 452. So, he has been allowed the amount of a sum paid by him, with the approval of his ward, to a third party for a guaranty on obtaining an extension of the time for the payment of a security belonging to them. *Burnham* v. *Dalling*, 18 N. J. Eq. 132. And *bona fide* expenses reasonably incurred by the guardian of an insane person, in resisting the application for a revocation of the guardianship on the ground of his restoration to sanity, have been allowed. *Palmer* v. *Palmer*, 38 N. H. 418.

A husband who receives into his family the children of his wife by a former marriage stands to them *in loco parentis*, and, in the absence of an express contract, or of circumstances showing a different arrangement, he has a right to their services and is liable for their support and education. *Mulhern* v. *McDavitt*, 16 Gray, 404. See *Martin* v. *Foster*, 38 Ala. 688. And where a ward was possessed of a small estate and able to earn something toward his support, and resided with his mother, who could support him, and with his step-father, who was his guardian, it was held, that the latter should not be allowed to charge the estate of the ward with his maintenance. *Bradford* v. *Bodfish*, 39 Iowa, 681.

A guardian cannot charge the estate of his ward with any part of the expense of a controversy on the settlement of his accounts, where such controversy was occasioned by his own fault. *Blake* v. *Pegram*, 109 Mass. 541. See, also, *Moore* v. *Shields*, 69 N. C. 50. And a father who procures himself to be appointed guardian of the persons and estates of his children cannot claim a credit for the improvement of the estates. And if a sale made is proved to have been for the benefit of the father, it will be set aside. *Lane* v. *Taylor*, 40 Ind. 495.

§ 7. **Interest.** See *ante*, 550, art. 3, § 4. And see, as to interest, *Matter of Mott*, 26 N. J. Eq. 509. *Garland* v. *Norman*, 50 Miss. 238; *Tanner* v. *Skinner*, 11 Bush (Ky.), 120; *Farwell* v. *Steen*, 46 Vt. 678. A guardian is responsible for interest if he keeps the ward's funds unemployed when they could have been safely invested; for it is his duty to make investments if it can be safely done by the exercise of due diligence. This is the law independently of statute, and he cannot, therefore, be relieved from interest upon a mere showing that the

funds have not been used. *Owen* v. *Peebles*, 42 Ala. 338. But a guardian who has acted without fraud cannot be charged with compound interest. *Harland's case*, 5 Rawle (Penn.), 323; *Childress* v. *Childress*, 49 Ala. 237. See *Robinson* v. *Robinson*, 9 Eng. L. & Eq. 70; *Greening* v. *Fox*, 12 B. Monr. (Ky.) 187; *Bentley* v. *Shreve*, 2 Md. Ch. 215. Nor should he be charged even with simple interest on money in hand, if he proves that he could not, by the exercise of reasonable diligence, make a proper investment (*Brand* v. *Abbott*, 42 Ala. 499); unless there was a conversion by him of the money. Id.

If the guardian loans his ward's money on usury, whereby the whole debt is forfeited, he is liable for both principal and interest. *Draper* v. *Joiner*, 9 Humph. (Tenn.) 612. And if it is shown that the guardian has made more from an investment than the legal rate of interest, he will be charged with all that he has made out of the estate. *Foteaux* v. *LePage*, 6 Iowa, 123; *Frost* v. *Winston*, 32 Mo. 489. And see *Lamb's Appeal*, 58 Penn. St. 142; *French* v. *Currier*, 47 N. H. 88.

§ 8. **Final settlement and release, and offset.** See *ante*, 564, § 5. It is the rule in some of the States, that the guardian's final account must include all the items embraced in former partial accounts. And it is irregular to start the final account with the balance of a former one. *Yeager's Appeal*, 34 Penn. St. 173; *Foltz's Appeal*, 55 id. 428. But in other States this practice is not observed.

The guardian's final account is not allowed by the court, until the ward has had an opportunity to examine it (*Whitney* v. *Whitney*, 7 Sm. & M. [Miss.] 740); unless the guardianship terminates pending the infancy of the ward, in which case, a final account is sometimes allowed on notice to parties interested, and examination by a guardian *ad litem* on behalf of the ward. See *Hudson* v. *Martin*, 34 Me. 339. But the ward may still dispute the account on attaining his majority. *Blake* v. *Pegram*, 101 Mass. 592; *Racouillat* v. *Requena*, 36 Cal. 651. Upon the death, resignation or removal of a guardian, his final account must be presented, and it is the duty of his successor to see that the former guardian is held to a strict compliance with his bond. See *Hemphill* v. *Lewis*, 7 Bush (Ky.), 214; *Peck* v. *Braman*, 2 Blackf. (Ind.) 141. The personal representative of the deceased guardian is the proper person to present the final account. *Woodbury* v. *Hammond*, 54 Me. 332, 343; *Waterman* v. *Wright*, 36 Vt. 164. But it is held, that the administrator of a deceased guardian has no authority to make investments of the ward's funds; nor can he discharge the general indebtedness of the guardian to his ward by setting apart certain effects of the guardian's estate for that purpose. *Moorehead* v. *Orr*, 1 S. C. (N. S.) 304.

Where a guardian has money in his hands as administrator, he is bound to transfer it in the course of his guardianship. And if he neglect to pass an account charging himself with it, such neglect will be deemed a breach of the condition of the guardian's bond. *Crenshaw* v. *Crenshaw*, 4 Rich. (S. C.) Eq. 14; *Mattoon* v. *Cowing*, 13 Gray, 387; *State* v. *Tunnell*, 5 Harr. (Del.) 94.

A set-off against infants on a note sued on by their guardian is not a case for equitable relief. A just and valid claim against the infants may be rightfully set off against the note. *Crafton* v. *Boon*, 5 Heisk. (Tenn.) 93. But claims due by a guardian for property which he received from the mother of his wards, cannot be set off against claims due to the guardian by the estate of their father. There must be reciprocity and mutuality in the right of set off, and the demands on the one side and the other must be in the same right. *Gibbs* v. *Cunningham*, 4 Md. Ch. Dec. 322.

A final settlement of a guardian's accounts, made by him voluntarily before his ward has attained majority, is not void on that account. *Spencer* v. *Spencer*, 50 Ala. 445.

§ 9. **Opening settlements.** See *ante*, 564, § 5. The final settlement of a guardian made in the proper court, unless revoked, reopened, or appealed from, is conclusive upon the parties. It cannot be attacked collaterally, in a suit by the ward on the guardian's bond, for the allowance to a third person of an unjust and fraudulent claim in such settlement. *Holland* v. *State*, 48 Ind. 391. And it will be reopened only in a case very clearly calling for new action. *Brown* v. *Mc Williams*, 29 Ga. 194; *ante*, 564, § 5.

But where a guardian settles his accounts with his wards soon after they become of age, without any examination of items, or the aid of friends on their part, and on delivering to each his share as computed by the guardian, they give him discharge in full, such accounts may be reopened for the correction of mistakes or errors; such, for instance, as the omission to charge the guardian with interest, where it ought to have been charged. *Runkle* v. *Gale*, 3 Halst. (N. J.) Eq. 101; *Stark* v. *Gamble*, 43 N. H. 465. So, under the Massachusetts statute, upon final settlement by a guardian, a former account may be opened by leave of court, as to matters of substance as well as of form, although an appeal from such former account has been taken and determined, and although no application has been made to the probate court for the opening of the former account other than is involved in the objections to the allowance of the latter account. *Blake* v. *Pegram*, 109 Mass. 541.

It is against equity to allow a review of a guardian's account, in

order to strike out payments made by him in relief of the estate, when there was no administrator, and in order to save the expense of one. *Stevenson's Appeal*, 32 Penn. St. 318.

§ 10. **Confirming and vacating.** A decree of confirmation, by the proper tribunal, on an auditor's report of the settlement of a guardian's account, is conclusive as to his liability to his ward. *Commonwealth* v. *Moltz*, 10 Penn. St. 527. But a refusal to confirm is not such a final disposition of the subject-matter as to terminate the jurisdiction, or to bar a confirmation at a subsequent term of the proper court. *Rightor* v. *Gray*, 23 Ark. 228.

ARTICLE IX.

RIGHTS AND OBLIGATIONS OF WARDS.

Section 1. In general. The relation of guardian and ward, and the rights and obligations which grow out of it, are peculiarly within the jurisdiction of a court of equity; and its power to afford relief for a breach of trust cannot be questioned, unless taken away by some express statutory enactment. *Crain* v. *Barnes*, 1 Md. Ch. 151. See, also, *Hill* v. *McIntire*, 39 N. H. 410. Fraudulent transactions will not be permitted to stand as against the ward. See *Lemly* v. *Atwood*, 65 N. C. 46. Courts will presume strongly in favor of the ward, and against the guardian, if the latter has been delinquent or guilty of neglect. *Jennings* v. *Kee*, 5 Ind. 257.

A guardian is never allowed to make money out of his ward; what is made must be accounted for. *Lee* v. *Fox*, 6 Dana (Ky.), 171; *Eberts* v. *Eberts*, 55 Penn. St. 110. Nor can a guardian make admissions to bind an infant (*Cochran* v. *McDowell*, 15 Ill. 10); or waive any benefit to which his ward is entitled in a decree. *Hite* v. *Hite*, 2 Rand. (Va.) 409. And the possession of the guardian is the possession of the ward. *Magee* v. *Toland*, 8 Port. (Ala.) 36.

§ 2. **Ward's election as to guardian's acts.** Where the guardian has made profits by the employment of the funds of the ward, the latter may elect to take the profits or charge the former with interest, but is not entitled to both. *White* v. *Parker*, 8 Barb. 48; *Jones* v. *Beverly*, 45 Ala. 161; *Brisbane* v. *The Bank*, 4 Watts, 92. And he may claim any specific article of property purchased with his money, although the guardian may have taken the title to himself. *Chanslor* v. *Chanslor*, 11 Bush (Ky.), 663. Likewise, if the guardian invest the money of his ward in real estate, without authority, the ward, on attaining his majority, may elect whether to receive the real estate, or to

receive the money and interest. *Eckford* v. *DeKay*, 8 Paige, 89; *Loyd* v. *Malone*, 23 Ill. 43; *Wood* v. *Stafford*, 50 Miss. 370. And the right of election goes to the ward's personal representatives if he dies under age. *Singleton* v. *Love*, 1 Head (Tenn.), 357. An award on a submission to arbitration by the guardian is voidable by the ward on his coming of age. *Barnaby* v. *Barnaby*, 1 Pick. 221. And the purchase by a guardian of his ward's property, on a sale by him, is voidable at the option of the ward. *Scott* v. *Freeland*, 15 Miss. 409. See, also, *Chorpenning's Appeal*, 32 Penn. St. 315; *Green* v. *Green*, 7 Hun (N. Y.), 492; *Patton* v. *Thompson*, 2 Jones' (N. C.) Eq. 285.

§ 3. **Ward's adoption of guardian's acts.** The guardian's acts relative to the property of his ward may become binding upon the latter by his subsequent adoption thereof on attaining his majority. Thus, it is a recognized principle, that where the ward, after arriving at age, with full knowledge of all the facts, and in the absence of fraud or mistake of fact, receives and retains the purchase-money arising from the guardian's sale of his real estate, he is estopped from afterward denying the validity of such sale. *Pursley* v. *Hays*, 17 Iowa, 310. Nor is this principle confined to cases of voidable sales, but it likewise extends to those where the sale is void. *Deford* v. *Mercer*, 24 Iowa, 118.

§ 4. **Settlement out of court.** The courts look upon settlements made by guardians with their wards, recently come of age, with much distrust, and will not consider them binding, unless made with the fullest deliberation and the most abundant good faith on the part of the guardian. *Hawkins' Appeal*, 32 Penn. St. 263; *Sullivan* v. *Blackwell*, 28 Miss. 737; *McClellan* v. *Kennedy*, 8 Md. 230. In chancery practice the ward is usually allowed one year, after attaining majority, within which to examine and reopen his guardian's accounts. *Matter of Van Horne*, 7 Paige, 46. But as it regards probate guardianship in this country, settlements out of court usually give way to settlements in court, and there would seem to be no necessity for the application of the chancery rule, where there is no proof of fraud or error. See *ante*, 568, art. 8, § 9; *McDow* v. *Brown*, 2 S. C. (N. S.) 95; *Pierce* v. *Irish*, 31 Me. 254.

§ 5. **Release by ward.** A release to a guardian, by his ward, after becoming of age, with full knowledge of the facts, and in the absence of any undue means used on the part of the guardian to obtain it, is binding. *Kirby* v. *Taylor*, 6 Johns. Ch. 242. See *Brewer* v. *Vanarsdale*, 6 Dana (Ky.), 204; *Hall* v. *Cone*, 5 Day (Conn.), 543. But a release in full is a discharge only for the amount actually received by the wards, and binds those only having authority to give it; and its

validity and effect, though under seal, may be taken inte consideration by the court. *Witman's Appeal*, 28 Penn. St. 376; *Felton* v. *Long*, 8 Ired. (N. C.) Eq. 224; *Stark* v. *Gamble*, 43 N. H. 465. And where a ward makes deeds of gift or of release and acquittance to his guardian, or one who has acted as guardian, soon after coming of age, but before the guardian has delivered up the ward's property, or settled his account, the conveyance is void, on the ground of public policy, without proof of actual fraud, and much more where there are circumstances showing actual fraud. *Waller* v. *Armistead*, 2 Leigh (Va.), 11.

§ 6. **Action by ward against guardian.** It has been held that a spendthrift under guardianship can maintain no action in his own name alone, for an assault and battery committed upon him by his guardian. *Mason* v. *Mason*, 19 Pick. 506. But an infant has been allowed to sue his guardian by next friend. See Id. So, it has been held that the ward may sue for use and occupation, although he has a general guardian. *Porter* v. *Bleiler*, 17 Barb. 149. And where one assumes to be guardian, or the agent of a guardian, and, as such, enters on the infant's land, and receives the rents, the infant may elect to consider him a wrong-doer, and bring trespass, or charge him as guardian. *Sherman* v. *Ballou*, 8 Cow. 304. See *Stannard* v. *Whittlesey*, 9 Conn. 556. But a ward cannot maintain an action of *assumpsit* against his guardian, or *quasi* guardian, the parent. The remedy is by action of account or bill in equity, in which the equity between the parties may be adjusted and rightfully settled. *Linton* v. *Walker*, 8 Fla. 144. See *Field* v. *Torrey*, 7 Vt. 372; *Pickering* v. *De Rochemont*, 45 N. H. 67; *Armstrong* v. *Miller*, 6 Ohio, 118. Or, what is a more proper course in this country, the ward may institute proceedings for the guardian's removal, and sue on the official bond. *Brooks* v. *Brooks*, 11 Cush. 18.

An action at law cannot be maintained by a ward against his guardian, for the use, income, or profits of the property, which went into the guardian's possession by virtue of his appointment as such, until there has been a settlement of the accounts, and a balance has been struck. *Chapman* v. *Chapman*, 32 Ala. 106. And see *Nutz* v. *Reutter*, 1 Watts (Penn.), 229; *Robertson* v. *Robertson*, 1 Root (Conn.), 51. And the ward's right to call his guardian to account may be barred by limitation. Thus, it is held by the court in Pennsylvania, that a ward who delays the commencement of proceedings to charge his guardian with negligence for eighteen years after arriving at age, is barred by the lapse of time. *Bones's Appeal*, 27 Penn. St. 492. But in Illinois the rule is stated to be, that, although the guardian may be out of office, he is still liable to account, and this liability continues so long as his

bond is in force. *Gilbert* v. *Guptill*, 34 Ill. 112. It is said that the former may be regarded as the true doctrine for chancery guardianship, while the latter is applicable to probate guardianship. Schoul. Dom. Rel. See *Coleman* v. *Willi*, 46 Mo. 236.

§ 7. **Action against third persons dealing with guardian.** Courts of chancery will aid a person under guardianship to recover property embezzled, concealed, or conveyed away in fraud of his rights. See *Hill* v. *McIntire*, 39 N. H. 410. And by statute, in some of the States, the ward may, without the intervention of his guardian, proceed against any one suspected of having embezzled his estate. *Sherman* v. *Brewer*, 11 Gray, 210.

Where a natural guardian sells his ward's personal property illegally, suit may be brought against the vendee for the recovery thereof without demand being first made. *McCarty* v. *Rountree*, 19 Mo. 345.

§ 8. **Liabilities of ward.** An action will not lie against a guardian upon the contract of his ward, but must be brought against the ward, who may defend by guardian. *Brown* v. *Chase*, 4 Mass. 436. And see *Willard* v. *Fairbanks*, 8 R. I. 1. A mechanic cannot maintain *assumpsit* against the guardian of a minor for labor performed upon the ward's buildings. *Robinson* v. *Hersey*, 60 Me. 225. Nor will an action lie against a guardian and his ward jointly, for the recovery of a debt incurred by the ward previous to the appointment of the guardian. *Allen* v. *Hoppin*, 9 R. I. 258. To render the guardian responsible for the act of his ward, he must be, in some way, connected with it, and it must be shown to have been done by his directions, or with his assent; it is not sufficient to show that he had previously allowed him to make contracts in relation to his own property. *Camp* v. *Dill*, 27 Ala. 553.

The ward is legally bound to remain with his guardian, and to submit himself to his control. Hence, if he escapes from the guardian and lives with another, and then returns to the house of the guardian in consideration of the promise of the latter that he will not charge him for boarding with him, the promise of the guardian is void for want of consideration, and he may rightfully charge the ward for boarding with him. *Keith* v. *Miles*, 39 Miss. 442. But a guardian cannot maintain an action against his ward for money advanced, or services rendered as guardian to the ward, while his account remains unadjusted in the probate court. *Smith* v. *Philbrick*, 2 N. H. 395.

An infant having a guardian or parent who supplies his wants cannot bind himself for necessaries. *Guthrie* v. *Murphy*, 4 Watts (Penn.), 80.

ARTICLE X.

SUITS BY AND AGAINST GUARDIANS.

Section 1. In general. In general, the guardian must sue in the name of his ward. *Sillings* v. *Bumgardner*, 9 Gratt. (Va.) 273; *Longstreet* v. *Tilton*, Coxe (N. J.), 38. But it has been held that he may sue in his own name in the following cases: For intermeddling with the issues and profits of real estate belonging to his ward (*Beecher* v. *Crouse*, 19 Wend. 306); for trespass on his ward's lands (*Truss* v. *Old*, 6 Rand [Va.], 556; *Hughes' Appeal*, 53 Penn. St. 500); for the non-payment of rent (*Pond* v. *Curtiss*, 7 Wend. 45. And see *Thacker* v. *Henderson*, 63 Barb. 271); on a note payable to himself, as guardian, though given for a debt due his ward (*Baker* v. *Ormsby*, 4 Scam. [Ill.] 325); and, it seems, on an express contract made by him for the benefit of the ward. *Thomas* v. *Bennett*, 56 Barb. 197. So, he may sue in his own name for an injury to the property of the ward in his actual possession (*Fuqua* v. *Hunt*, 1 Ala. 197); or where he merely has the right of possession. *Field* v. *Lucas*, 21 Ga. 447. And sometimes the guardian is authorized by statute to sue in his own name for the use of the ward. *Longmire* v. *Pilkington*, 37 Ala. 296; *Mebane* v. *Mebane*, 66 N. C. 334.

But, as a general rule, where the matter lies in action the suit must be prosecuted in the name of the ward. *Sutherland* v. *Goff*, 5 Port. (Ala.) 508; *Bradley* v. *Amidon*, 10 Paige, 235; *Fox* v. *Minor*, 32 Cal. 111; *Anderson* v. *Watson*, 3 Metc. (Ky.) 509. A guardian cannot prosecute a suit in his own name, for a debt due a female minor, after her marriage. *Barnet* v. *Commonwealth*, 4 J. J. Marsh. (Ky.) 389. Nor can he maintain an action in his own name on an award, although the submission to arbitration was made by him, and the award was to him, in his representative character. *Hutchins* v. *Johnson*, 12 Conn. 376. Nor can he subscribe a libel for divorce (*Winslow* v. *Winslow*, 7 Mass. 96); or act on a petition for partition. *Totten's Appeal*, 46 Penn. St. 301. So, an action for an assault and battery, committed upon an infant, must be brought in the name of the infant, by his guardian, and not in the name of the guardian. *Stewart* v. *Crabbin*, 6 Munf. (Va.) 280. See *Pepoon* v. *Clarke*, 1 Mill. (S. C.) Const. 137. And a promise to "the guardians of the minor children of A B," is a promise to the minors, and should be sued in their names. *Carskadden* v. *M'Ghee*, 7 Watts & Serg. (Penn.) 140.

An action will not in general lie against the guardian for the ward's debts or contracts; the action should be against the ward. *Ante*, 572, art.

9, § 8; *Willard* v. *Fairbanks*, 8 R. I. 1. And see *Cole* v. *Eaton*, 8 Cush. 587; *Gwaltney* v. *Cannon*, 31 Ind. 227. But he may be sued upon a contract made by himself touching his ward's estate. *Stevenson* v. *Bruce*, 10 Ind. 397. And where a guardian brings an action of replevin in favor of his ward, and signs the replevin bond individually, he will be liable on it in his individual capacity. *Oliver* v. *Townsend*, 16 Iowa, 430.

A guardian may follow his ward's money, and recover it from one who obtained it from a former guardian under a contract made by such former guardian in his individual capacity, and not as guardian. *Fox* v. *Kerper*, 51 Ind. 148.

Under the statute of Illinois, a guardian has no authority to bring suits in relation to the real estate of his ward. *Muller* v. *Benner*, 69 Ill. 108. And under the West Virginia Code, a guardian cannot file a bill in equity in his own name as guardian to recover the distributive share or interest of his wards in the personal estate of their ancestor. The suit should be brought in the name of the infants by their next friend who may be guardian. *Burdett* v. *Cain*, 8 W. Va. 282.

ARTICLE XI.

REMEDIES ON GUARDIAN'S BOND.

Section 1. Jurisdiction and remedy. The proper remedy for the default and misconduct of the guardian is by a suit on the probate bond, brought in the name of the judge, or the State, as the statute may prescribe, for the benefit of the person or persons injured. *Pearson* v. *McMillan*, 37 Miss. 588; *Potter* v. *State*, 23 Ind. 607. In Kansas, any person injured by a breach of a guardian's bond has a right to sue therefor in his or her own name, although the bond was executed in the name of the State as obligee. *Crowell* v. *Ward*, 16 Kan. 60.

The guardian's estate being insolvent, and his sureties irresponsible, it is not necessary for the ward to institute proceedings at law before he can file a bill in equity to recover such part of the estate as he can trace. And any person in whose hands any part of the ward's estate can be found will be held as a trustee for the amount, if it can be shown that it came into his possession with notice of the trust. *Hill* v. *McIntire*, 39 N. H. 410. And see *Branch* v. *DuBose*, 55 Ga. 21.

And where a guardian's bond was void at law, on the ground that the sureties were justices of the county, and, therefore, both obligors and obligees, the bond was enforced in equity. *Butler* v. *Durham*, 3 Ired. (N. C.) Eq. 589.

§ 2. **Right of action.** An action cannot be maintained against a guardian or his sureties, on his official bond, whilst the relation of guardian and ward subsists. *Eiland* v. *Chandler*, 8 Ala. 781. Nor, in most of the States, until after proceedings to ascertain the amount due on the guardianship accounts. *Salisbury* v. *Van Hoesen*, 3 Hill, 77; *Pratt* v. *McJunkin*, 4 Rich. (S. C.) 5; *Justices* v. *Willis*, 3 Yerg. (Tenn.) 461; *Jarrett* v. *State*, 5 Gill & J. (Md.) 27; *Bailey* v. *Rogers*, 1 Me. 186; *Foteaux* v. *Le Page*, 6 Iowa, 123; *O'Brien* v. *Strang*, 42 id. 643. See *Brown* v. *Snell*, 57 N. Y. (12 Sick.) 286; *State* v. *Strange*, 1 Ind. 538. But a guardian cannot prevent an action on his bond by failing to render an account. *Wann* v. *People*, 57 Ill. 202.

The time within which suits on guardian's bonds must be brought is usually prescribed by statute. If no period is thus fixed, the ordinary limitation to suits on sealed instruments is applicable. *Ragland* v. *Justices*, 10 Ga. 65. In Massachusetts, the period of limitation to suits on guardian's bonds is fixed at four years from the termination of the guardianship. *Loring* v. *Alline*, 9 Cush. 68. So, in Ohio, *Favorite* v. *Booher*, 17 Ohio St. 548. In Kentucky, the period is five years (*Johnson* v. *Chandler*, 15 B. Mour. [Ky.] 584); while in Indiana, it is three years. *State* v. *Hughes*, 15 Ind. 104. See, as to the period of limitation in Maryland, *Byrd* v. *State*, 44 Md. 492.

An action may be maintained on a guardian's bond, against the guardian and his sureties, without previous demand. *Hudson* v. *Barnes*, 54 Ind. 378.

§ 3. **Rights of sureties.** Sureties on a guardian's bond, who are compelled to respond in damages for the guardian's default, may seek indemnity from his property. *Foster* v. *Bisland*, 23 Miss. 296; *Howell* v. *Cobb*, 2 Coldw. (Tenn.) 104. And equity likewise allows them to enforce contribution as among themselves. See *ante*, 538, art. 1, § 4; *Waller* v. *Campbell*, 25 Ala. 544. But the guardian cannot pledge the property of his ward as security to his own surety. *Poultney* v. *Randall*, 9 Bosw. (N. Y.) 232.

The sureties on a bond, as well as the guardian, are estopped by the recitals therein. *Sasscer* v. *Walker*, 5 Gill & J. (Md.) 102. So, the sureties are concluded by the amount adjudged for which the guardian is liable on settlement of his accounts. *Commonwealth* v. *Rhoads*, 37 Penn. St. 60. And a surety cannot become a party to the accounting of his principal either in the original proceeding or on a revision of such accounting. *Re Scott's Account*, 36 Vt. 297. See *Curtis* v. *Bailey*, 1 Pick. 198.

§ 4. **Liabilities of sureties.** See *ante*, 538, art. 1, § 4. The liability of the surety is not limited to the property owned by the ward at the

time of the execution of the bond, but extends to property received by the guardian before the bond was made (*Merrells* v. *Phelps*, 34 Conn. 109), and to property coming into his hands subsequent to the execution of the bond. *Gray* v. *Brown*, 1 Rich. (S. C.) 351. So, it is the duty of a guardian, whose powers as such have been revoked, to account to his wards, or to his successor as guardian, if there be one, for their estate, including evidences of claims which may have come to his hands; and if, after such revocation, he collects any money on account of any such claim, he and his surety as guardian are accountable therefor to the parties entitled thereto. *Sage* v. *Hammonds*, 27 Gratt. (Va.) 651. And where new sureties are given, they become liable for breaches of the bond before they became sureties, as well as for subsequent breaches. *Steele* v. *Reese*, 6 Yerg. (Tenn.) 263; *Bell* v. *Jasper*, 2 Ired. (N. C.) Eq. 597. See *ante*, 538, art. 1, § 4.

But the sureties on the general bond of a guardian are not responsible for the failure of the guardian to account for money received from the sale of real estate of his ward, or its misapplication by him. Such sale is no part of his general duties. *Henderson* v. *Coover*, 4 Nev. 429. And see *Muir* v. *Wilson*, Hopk. (N. Y.) 512; *Williams* v. *Morton*, 38 Me. 47; *Colburn* v. *State*, 47 Ind. 310. Nor can the sureties of a guardian be made liable for an account for the work and labor of the wards, done for the guardian. *Phillips* v. *Davis*, 2 Sneed (Tenn.), 520. And where a guardian, on the expiration of his guardianship during the minority of his ward, leaves the State without paying the balance due, the surety on his bond will not be liable, unless a new guardian has been appointed and demand made. *Favorite* v. *Booher*, 17 Ohio St. 548. See *Horton* v. *Horton*, 4 Ired. (N. C.) Eq. 54.

An action lies upon a guardian's bond, against the surety, without any previous suit against the principal. *Call* v. *Ruffin*, 1 Call. (Va.) 333; *Jarrett* v. *State*, 5 Gill & J. (Md.) 27; *State* v. *Strange*, 1 Ind. 538. And in a suit against sureties on a guardian's bond, if some of the sureties have died, their personal representatives should be made parties. *Lynch* v. *Rotan*, 39 Ill. 14; *Commonwealth* v. *Cox*, 36 Penn. St. 442; *Jones* v. *Hays*, 3 Ired. (N. C.) Eq. 502.

§ 5. **Defense.** If a guardian's bond contains more than the statute requires, it is not thereby invalidated. *Pratt* v. *Wright*, 13 Gratt. (Va.) 175. So, it is valid although it does not recite the fact of the guardian's appointment. Id. And if the condition relates to a part only of his duty, it is valid to the extent of the condition. Id. But if the bond contains no penalty, this will prevent a recovery at law. *Bumpus* v. *Dotson*, 7 Humph. (Tenn.) 310.

Lapse of time, during which a ward is prosecuting an action against

the guardian, and the statute of limitations, furnish no ground for exoneration of a surety of the guardian from liability. *Roberts* v. *Colvin*, 3 Gratt. (Va.) 358. Nor are the sureties discharged from liability by the fact that the guardian's account is not settled until more than two years after his death, and after the right of action against the administrator is barred by the statute of limitations. *Chapin* v. *Livermore*, 13 Gray, 561. And see *Ashby* v. *Johnstone*, 23 Ark. 163.

In *Greenly* v. *Daniels*, 6 Bush (Ky.), 141, a judgment in favor of a ward, obtained in a suit on the guardianship bond, against the guardian and his sureties, was reversed as to the sureties, on the ground that the ward was not named in the bond.

A bond executed by a guardian and sureties to a judge of probate in one State, under the laws of that State, is purely a creature of its statute law. And if the remedy provided for the violation of the bond be one peculiar to the laws of the State where it is executed, the courts of another State, to whose system of jurisprudence such a remedy is unknown, will not enforce the obligation. *Probate Court* v. *Hibbard*, 44 Vt. 597; S. C., 8 Am. Rep. 396.

CHAPTER LXXVII.

HIRE OF SERVICES.

TITLE I.

OF THE HIRE OF SERVICES IN GENERAL.

ARTICLE I.

OF THE GENERAL RULES OF LAW RELATING TO THE HIRE OF SERVICES.

Section 1. Nature of the contract. The hire of services is a contract, by which the work or service of a person is given for a compensation or reward. Out of the contract arises the relation of master and servant or that of employer and employee; or, if the services are to be employed upon a chattel, the contract of hiring is a bailment, and the relation arising out of it is that of bailor and bailee. The peculiar features of the relation of master and servant are of sufficient importance to form the subject of a separate title; while the general principles of law, relating to the hiring of services of all kinds, will be given in the following sections.

It is essential to the validity of a contract for services, that the parties thereto have the legal capacity to contract. And if either party labors under a legal disability which prevents him from making a valid contract for services, the contract cannot be enforced. Thus, it would seem to be well settled in this country, at least, whatever may be the rule of law in England, that an infant is not bound by a contract of hiring entered into by him, although for his benefit, but such contract is *voidable* if the infant chooses so to elect. *Lufkin* v. *Mayall*, 25 N. H. 82; *Hoxie* v. *Lincoln*, 25 Vt. 206; *Lowe* v. *Sinklear*, 27 Mo. 308; *Francis* v. *Felmit*, 4 Dev. & Bat. (N. C.) 498; *Clark* v. *Godard*, 39 Ala. 164. See *Reg.* v. *Lord*, 12 Q. B. 757. So, as to the contracts of lunatics and idiots; they are *voidable* whether beneficial or not. *Maddox* v. *Sim mons*, 31 Ga. 512; *Cook* v. *Parker*, 5 Phil. (Penn.) 265; *Crowther* v. *Rowlandson*, 27 Cal. 376. And a contract entered into by one so far intoxicated as to impair his reasoning faculties is void. *Burroughs* v. *Richman*, 13 N. J. (1 Green) 233. So, of a contract obtained by

duress (*Burr* v. *Burton*, 18 Ark. 214); or by gross misrepresentation or fraud. *Jones* v. *Austin*, 17 id. 498; *Bank* v. *Gregg*, 14 N. H. 331.

If an infant hires out his services for a specified term, at a fixed price, he may abandon the service at any time before the expiration of the term, and although he may not recover upon the contract, he is entitled to recover what his services were reasonably worth. *Vent* v. *Osgood*, 19 Pick. 572; *Van Pelt* v. *Corwine*, 6 Ind. 363. And he is not liable to have the damages occasioned by his breach of contract deducted from the amount he otherwise would be entitled to recover for his labor. *Whitmarsh* v. *Hall*, 3 Denio, 375; *Derocher* v. *Continental Mills*, 58 Me. 217; S. C., 4 Am. Rep. 286. If the contract has been fully performed by the infant, he may sue for the contract price, or he may avoid the contract and sue upon a *quantum meruit*. *Davies* v. *Turton*, 13 Wis. 185; *Oaks* v. *Oaks*, 27 Vt. 410. And see *Spencer* v. *Storrs*, 38 Vt. 156. But if an infant continues in his employer's service after becoming of age, he will be treated as having ratified his contract, and if he then refuses performance he can recover nothing for his services rendered under his contract. *Forsyth* v. *Hastings*, 27 Vt. 646.

At common law, a married woman could not make a valid contract for the services of others except as the agent of her husband. See *Mizen* v. *Pick*, 3 Mees. & W. 481; *Lane* v. *Ironmonger*, 13 id. 368. But it is otherwise in this country under many of the statutes enacted in the different States, for the removal of the legal disabilities of married women. And, at common law, a married woman, an infant, a lunatic, or person of unsound mind, is bound by a contract for services that are *actually necessary*. See *Reed* v. *Moore*, 5 Carr. & P. 200; *Richardson* v. *Strong*, 13 Ired. (N. C.) 106; *Skidmore* v. *Romaine*, 2 Bradf. (N. Y.) 122; *Barnes* v. *Hathaway*, 66 Barb. 452; *Sims* v. *McLure*, 8 Rich. (S. C.) Eq. 286.

As to the power of a corporation to make binding contracts, see *ante*, Vol. 2, pp. 318–321.

§ 2. **Express contracts.** It is an established rule, that an implied contract cannot arise where there is a subsisting express contract covering the entire subject-matter. *Galloway* v. *Holmes*, 1 Doug. (Mich.) 330; *Ford* v. *McVay*, 55 Ill. 119; *Smith* v. *Bowler*, 1 Disney (Ohio), 520. A contract in writing is presumed to embrace all that the parties intended, and unless there is a latent ambiguity, parol evidence is not admissible to alter, vary, or explain it. *Kemp* v. *Rose*, 1 Giff. 258; *Evans* v. *Roe*, L. R., 7 C. P. 138; S. C., 2 Eng. R. 116. This rule is applicable to contracts for work or service (Id.); and in an action upon a written contract that the plaintiff should serve the defendant at a

certain annual salary, the plaintiff was not permitted to show that it was agreed that the salary should be paid quarterly, nor would the court infer such an agreement from the fact that it had been so paid. *Giraud* v. *Richmond*, 2 C. B. 835. And in the case of an express contract, there can be no recovery except upon the contract, unless there has been a rescission of it. *Jenkins* v. *Long*, 8 Md. 132.

A contract of hiring, unless for more than one year, need not be in writing. But it is essential to an express contract of hiring that its terms be definitely fixed; otherwise, no action can be maintained upon it, unless the parties enter upon its performance. *Tebbetts* v. *Haskins*, 16 Me. 283; *Hartley* v. *Cummings*, 5 C. B. 247. Both parties must be bound by the contract, the one to employ, and the other to serve, for a definite time. *Elsee* v. *Gatward*, 5 Term R. 143; *Williamson* v. *Taylor*, 5 Q. B. 175. And a mere promise to work for another, without any time or terms being fixed upon, is not a contract for a breach of which an action will lie. Id.; *Sykes* v. *Dixon*, 9 Ad. & El. 693.

If an individual issues proposals for bids for any kind of work, and he finds upon opening them that they far exceed his views or his means, he does not thereby bind himself to the contractor who proposes to take the job, and who happens to be the lowest bidder. He has a right to determine whether he will proceed to the completion of the work proposed, or not. *People* v. *Croton Aqueduct Board*, 49 Barb. 259. And under ordinary circumstances the same rule would apply to public bodies, unless there is some positive enactment which interferes with or prevents its enforcement. Id. And see *Adams* v. *Ives*, 63 N. Y. (18 Sick.) 650; *Kingston upon Hull* v. *Petch*, 10 Exch. 611; *Allen* v. *Yoxall*, 1 Carr. & K. 315. And where a contract is to be made out by an offer on one side and an acceptance on the other, if the answer is equivocal, or if any thing is left to be done, the two do not constitute a binding contract. *Appleby* v. *Johnson*, L. R., 9 C. P. 163.

Where the contract is indefinite as to the compensation to be paid, the reasonable value of the services may be recovered. And this value is generally ascertained by the usual price paid for like services at the time and place of performance. *Bagley* v. *Bates*, Wright (Ohio), 705; *Mattocks* v. *Lyman* 16 Vt. 116; *Jones* v. *School District*, 8 Kan. 362; *Nauman* v. *Zoerhlaut*, 21 Wis. 466. In determining the value of professional services, or skilled labor, jurors are always permitted to take into consideration the exhausting studies, the time consumed, and the expenses incurred, to acquire great professional knowledge and distinction, or great mechanical, or other skill. *Stockbridge* v. *Crooker*,

34 Me. 349. And see *Commissioners of Leavenworth* v. *Brewer*, 9 Kan. 307. See 17 Alb. L. J. 138.

If no time is fixed in the contract for the completion of the work, or for payment therefor, the inference of law is, that the work is to be paid for when the labor is completed, and no recovery can be had until the work is completed, or the contract is in some legal way terminated. And parol evidence of a verbal agreement, as to the time of payment, made when the contract was signed, is inadmissible. *Thompson* v. *Phelan*, 22 N. H. 339. See *Blodgett* v. *Berlin Mills Co.*, 52 id. 215; *Clark* v. *Clifford*, 25 Wis. 597. Where the contract is to serve for a specific term, as a year, provided both parties shall be suited, either party may end the contract at his election, and if no time for payment is agreed on, there can be no recovery of the compensation earned, before the expiration of the full term. *McMillan* v. *Vanderlip*, 12 Johns. 165; *Dover* v. *Plemmons*, 10 Ired. (N. C.) 23; *Olmstead* v. *Beale*, 19 Pick. 528; *Craig* v. *Pride*, 2 Spears (S. C.), 121; *Andrews* v. *Portland*, 35 Me. 475; *Kettle* v. *Harvey*, 21 Vt. 301. And where there is an entire contract for the performance of any particular service, and the party contracting to do the service fails in *full* performance, he is not entitled to recover for a *part* performance. Id.; *Sickels* v. *Pattison*, 14 Wend. 257. And see *Phelps* v. *Sheldon*, 13 Pick. 50; *Sebastian* v. *Tompkins*, Litt. Sel. Cas. 198.

Where one performs work for another under an agreement to be compensated in a specific way, or in specific property, he is entitled to compensation in money upon the refusal of the other to compensate him in the manner agreed upon. *Stone* v. *Stone*, 43 Vt. 180. If an employer has an established place where he pays his employees, and where he has reason to expect they will call for their hire, mere neglect to pay elsewhere, without evidence of a demand and refusal, will not justify the employees in abandoning the contract of service. *Dockham* v. *Smith*, 113 Mass. 320; S. C., 18 Am. Rep. 495.

If the duration of the term of service is left discretionary with either party, by the contract of hiring, either may end the term at any time. *Provost* v. *Harwood*, 29 Vt. 219. And so if the term is indefinite, as where the hiring is at a certain sum per month, for a term not exceeding five years. *Peacock* v. *Cummings*, 46 Penn. St. 434; *Tatterson* v. *Suffolk Maunf. Co.*, 106 Mass. 56. And see *Coffin* v. *Landis*, 46 Penn. St. 426; *Smart* v. *Sandars*, 5 Man. Gr. & Sc. 895; *Harper* v. *Hassard*, 113 Mass. 187. And under a contract of this kind, a party is not obliged to give a cause for terminating the contract. *Whitcomb* v. *Gilman*, 35 Vt. 297; *Evans* v. *Bennett*, 7 Wis. 404. In England, a hiring at so much per month, or a general hiring, is

understood to be a hiring for a year (*Rex* v. *Macclesfield*, 3 Term R. 76; *Beeston* v. *Collyer*, 4 Bing. 309; S. C., 2 Carr. & P. 609; *Fawcett* v. *Cash*, 5 B. & Ad. 904); and this rule is applicable to the hiring of domestic and farm servants, clerks, newspaper reporters, etc. Id.; *Baxter* v. *Nurse*, 1 Carr. & K. 10; *Holcroft* v. *Barber*, id. 4; *Ridway* v. *Hungerford Market Co.*, 3 Ad. & El. 171. And see *Emmens* v. *Elderton*, 4 H. L. Cas. 624. In this country, a general hiring, or any hiring for an indefinite time, is only at will, and may be ended at any time by either party. *Kirk* v. *Hartman*, 63 Penn. St. 97. See *Revere* v. *Boston Copper Co.*, 15 Pick. 351.

Where a person engages to work for another in consideration of a share of the profits of a business, he can recover nothing for his services unless there are profits earned during the term of service. *Friend* v. *Pettingill*, 116 Mass. 515. But, if in such a case a person is employed for a time certain, and, without cause, is discharged before the time is ended, he may recover the share of profits he would have been entitled to, had he been permitted to complete his term. *Bowen* v. *Cook*, 10 Ark. 309; *Hassell* v. *Nutt*, 14 Tex. 260.

A general engagement of a person, "at a salary of fifteen hundred dollars a year, payable weekly," unaffected by any other considerations growing out of the customs of the place, the conduct of the parties, or other extraneous evidence disclosing a contrary intention, was held to constitute a contract of hiring for the year. *Bleeker* v. *Johnson*, 51 How. (N. Y.) 380. And see *Earl of Mansfield* v. *Scott*, 1 Cl. & Fin. 319; *Williams* v. *Byrne*, 7 Ad. & El. 177.

Where, by the contract of hiring, the services were to be given at so much per month, but nothing was said about the term of service, — it was held, that the hiring was by the month. *Beach* v. *Mullin*, 34 N. J. Law, 343.

If a person continues in the service of another, after the term under a special contract fixing the time and price has expired, he will be considered as holding under the contract, and he cannot recover for the additional time upon a *quantum meruit*. *Grover, etc., Machine Co.*, v. *Bulkley*, 48 Ill. 189.

§ 3. **Implied contracts.** If the services are to be performed within a year, the contract of hiring need not be in writing. And as between strangers the general rule is, where nothing is shown to the contrary, that whenever services are rendered and received, a contract of hiring or an obligation to pay will be implied. *Hart* v. *Hess*, 41 Mo. 441. Still whether any contract is made, or on what terms it is made, must depend on the circumstances of each case. If a party merely speculates on the chance of being paid, taking upon himself the risk, there is said

to be no contract. But if he does work on the order of another, under such circumstances as that it must be presumed, that he looks to be paid as a matter of right by him, then a contract would be implied with that person. *Higgins* v. *Hopkins*, 3 Exch. 166. See, also, *Sprague* v. *Waldo*, 38 Vt. 139; *Tucker* v. *Virginia*, 4 Nev. 20; *Goddard* v. *Foster*, 17 Wall. 123; *Hertzog* v. *Hertzog*, 29 Penn. St. 465; *Ross* v. *Mitchell*, 28 Tex. 150; *Lipe* v. *Eisenlerd*, 32 N. Y. (5 Tiff.) 229; *Schwarz* v. *Schwarz*, 26 Ill. 81. In such cases parties are supposed to have made those stipulations which as honest, just, and fair men, they ought to have made. *Ogden* v. *Saunders*, 12 Wheat. (U. S.) 341.

But an obligation will not be implied to remunerate a party for his services, unless the circumstances are such as to show either that there must have been a mutual understanding to that effect, or if rendered without the party's knowledge, that the service was an act of necessity, for which he was legally bound to provide, or where it may be assumed that, if he had known of the exigency, he would have required such a service to have been performed, with the understanding that he was to pay for it. *Green* v. *Roberts*, 47 Barb. 521; *Hewett* v. *Bronson*, 5 Daly (N. Y.), 1; *Jones* v. *Jincey*, 9 Gratt. (Va.) 708; *Van-Arman* v. *Byington*, 38 Ill. 443. And the law makes a distinction between that *gratuitous service* which men constantly render to one another, and a service where it is obvious that the inducement to render it was the pecuniary compensation or reward to be received. In the former case no recovery can be had. Thus, if a man humanely bestows his labor and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as *gratuitous*, and it, therefore, forms no ground of action. *Bartholomew* v. *Jackson*, 20 Johns. 28. And see *Mumford* v. *Brown*, 6 Cow. 475; *Caldwell* v. *Eneas*, 2 Const. Rep. (S. C.) 348; *Doane* v. *Badger*, 12 Mass. 65; *Lee* v. *Lee*, 6 Gill & J. (Md.) 316. But where one does work for another by *compulsion*, whom he is under no legal or moral obligation to serve, the law will imply a promise on the part of the person benefited thereby, to make him a reasonable recompense. *Peter* v. *Steel*, 3 Yeates (Penn.), 250, 255. And so, where one induces another to perform valuable services for him by fraud. *Rickard* v. *Stanton*, 16 Wend. 25; *Higgins* v. *Breen*, 9 Mo. 497. But see *Alfred* v. *Fitzjames*, 3 Esp. 3; *Rex* v. *Ditton*, 4 Doug. 300. And if a person becomes an involuntary depositary of a chattel, as for instance, by finding, and the owner subsequently reclaims the chattel, the law implies a promise to pay the reasonable expense of its preservation. *Chase* v. *Corcoran*, 106 Mass. 286; *Tome* v. *Four Cribs of Lumber*, Taney, 533. And see *ante*, Vol. 2, title *Deposit*. So, as

a general rule, although the services rendered for the benefit of another were without his request or privity, yet his subsequent express promise will be binding, and even his subsequent assent will be sufficient evidence upon which to predicate a previous request. *Allen* v. *Richmond College*, 41 Mo. 302. And assent may be implied from the acts of another, or from his silent acquiescence. *Doty* v. *Wilson*, 14 Johns. 378. But where one intrudes his services upon another against his will, and without his assent, express or implied, no recovery can be had therefor. *Fox* v. *Sloo*, 10 La. Ann. 11. See, also, *Jones* v. *Woods*, 76 Penn. St. 408. And it is held that the necessity or value of the services cannot operate to change this rule. *Levee Commissioners* v. *Harris*, 20 La. Ann. 201; *Anderson* v. *Hamilton Township*, 25 Penn. St. 75. See *Chiniquy* v. *Deliere*, 37 Ill. 237.

In the case of children of any age, residing with and making part of the family of their father, the presumption of law is, that the services rendered on the one side, and the board and supplies furnished on the other, are *gratuitous*, and that payment for them is neither expected nor promised. *Smith* v. *Myers*, 19 Mo. 433; *Adams* v. *Adams*, 23 Ind. 50; *Hall* v. *Hall*, 44 N. H. 293. But this presumption may be met by proof of an express promise or agreement by the father to pay for the services of the child, or by the child, to pay for his or her board, or such supplies as were received (Id. And see *Davis* v. *Goodenow*, 27 Vt. 717; *Hart* v. *Hart*, 41 Mo. 441); or by proof of such circumstances, connected with their dealings with each other, as fairly warrant the inference that it was the understanding and expectation of the parties on both sides that such services and supplies were to be paid for as a debt. *Seavey* v. *Seavey*, 37 N. H. 133; *Ridgeway* v. *English*, 22 N. J. L. 409; *Dye* v. *Kerr*, 15 Barb. 444; *Andrus* v. *Foster*, 17 Vt. 556. In either case, the proof must be clear, direct and explicit, so as to leave no doubt as to the understanding and intention of the parties. *Duffey* v. *Duffey*, 44 Penn. St. 398; *Sullivan* v. *Sullivan*, 6 Hun (N. Y.), 658. And loose declarations will not be regarded as evidence of such an agreement, sufficient to rebut the legal presumption. *Hartman's Appeal*, 3 Grant's Cas. (Penn.) 234. When, however, the person taken into the family is not a child, but a more distant relation, the presumption of serving without pay is less strong, and slight circumstances will be sufficient to overcome it. *Thornton* v. *Grange*, 66 Barb. 507. See, also, *Hall* v. *Finch*, 29 Wis. 278; S. C., 9 Am. Rep. 559; *Wright* v. *Donnell*, 34 Tex. 291; *Miller* v. *Lanahan*, 6 Phil. (Penn.) 232. And it has been held that a request to render services made by a father is sufficient to sustain an implied promise to pay for the particular services to which the request relates, provided the cir-

cumstances do not rebut the idea that payment was expected or intended. *Miller* v. *Miller*, 16 Ill. 296; *Zerbe* v. *Miller*, 16 Penn. St. 488; *Steel* v. *Steel*, 12 id. 64; *Dougherty* v. *Whitehead*, 31 Mo. 255; *Grandin* v. *Reading*, 10 N. J. Eq. 370; *Kinnebrew* v. *Kinnebrew*, 35 Ala. 628.

If services are rendered in expectation of remuneration by a legacy, and there is nothing in the conduct or language of the person benefited by the services to induce such an expectation, they are deemed voluntary and gratuitous. *Thompson* v. *Stevens*, 71 Penn. St. 161. But where, from the circumstances of the case, it is manifest that it was understood by both parties that compensation should be made by will, and none is made, an action lies to recover what the services were reasonably worth. *Jones* v. *Jincey*, 9 Gratt. (Va.) 708; *Graham* v. *Graham*, 34 Penn. St. 475; *Shakespeare* v. *Markham*, 10 Hun (N. Y.), 311. And see *Campbell* v. *Campbell*, 65 Barb. 639. So, if the provision made by will is sufficient only to compensate in part for the services rendered, the party rendering them has, after the death of the testator, a cause of action for the balance against his personal representatives. *Reynolds* v. *Robinson*, 64 N. Y. (19 Sick.) 589.

One who enters upon the land of another under a parol contract to purchase, and makes improvements thereon, cannot, upon failure of the owner of the land to convey, recover for his services or the expense of such improvements. *Gillet* v. *Maynard*, 5 Johns. 85; *Ross* v. *Tremaine*, 2 Metc. (Mass.) 495; *Roach* v. *Wade*, 4 Monr. (Ky.) 523. If he has voluntarily abandoned the premises he must be deemed to have waived all claim to compensation. *Davies* v. *Davies*, 9 Carr. & P. 87; *Miller* v. *Tobie*, 41 N. H. 84. But it would be otherwise if the owner had turned the other out of the possession of the premises, and had availed himself of the benefit of his services, and the improvements made on the land. Id. And see *Day* v. *New York Central R. R. Co.*, 51 N. Y. (6 Sick.) 583; *Alcorn* v. *Harmonson*, 2 Blackf. (Ind.) 235; *Reeves* v. *Wallace*, 1 Port. (Ala.) 116. A contract to labor for another a certain time, and to take a piece of land in payment, if not in writing, does not bind the party who is to convey the land. The other party, therefore, is not bound to labor for the full term, and may recover for the value of the labor he has actually performed. *Ham* v. *Goodrich*, 37 N. H. 185; *King* v. *Brown*, 2 Hill, 485. See *Jack* v. *McKee*, 9 Penn. St. 235.

Services rendered for a person during his last illness, as a nurse and housekeeper, are not deemed to be gratuitous, but, on the contrary, there is an implied contract that the party receiving such service is to pay a fair compensation therefor. And the fact, if it were shown,

that the nurse or housekeeper lived with the man she was nursing and taking care of as his concubine, is held not to impair or lessen her claim for wages, unless it be alleged and shown that concubinage was the motive and cause of their living together in the first instance, and that the services rendered were merely incidental to that mode of living. *Succession of Pereuilhet*, 23 La. Ann. 294; S. C., 8 Am. Rep. 595. Where concubinage, though proved, does not appear to have been the motive of the association out of which the claim arises, we cannot view that circumstance as preventing or destroying any right which the woman may have on the defendant for a remuneration, and perhaps it increases his obligation, in a moral point of view, of doing her justice, instead of lessening it in a legal sense. MARTIN, J., in *Viens* v. *Brickle*, 8 Mart. (La.) 11. But see *Swires* v. *Parsons*, 5 Watts & Serg. 357; *Walraven* v. *Jones*, 1 Houst. (Del.) 355.

Where a woman has lived with a man in the belief that she was his lawful wife, she cannot, on discovering that the marriage between them was void, recover for her services upon an implied promise to pay for them. *Cropsey* v. *Sweeney*, 27 Barb. 310; 7 Abb. 129. But if the man led her into a void marriage fraudulently upon the false pretense that he was a single man, an action lies and it survives against his personal representatives. *Withee* v. *Brooks*, 65 Me. 14. A woman who lives with a man in a state of concubinage cannot recover compensation for services performed for him without proof of a contract of hiring. *Swires* v. *Parsons*, 5 Watts & Serg. 357.

§ 4. **Construction of contracts.** See, as to the construction of contracts in general, *ante*, Vol. 1, p. 114, *et seq.*

§ 5. **Validity at common law.** A contract to do an act that is immoral is void at common law, and will not be enforced. *Dumont* v. *Dufore*, 27 Ind. 263; *White* v. *Hunter*, 23 N. H. 128; *Martin* v. *Bartow Iron Works*, 35 Ga. 320. Thus, a contract to do certain acts in consideration of future illicit intercourse, although performance on the one side has been executed, is invalid. *Winebrinner* v. *Weisiger*, 3 Monr. (Ky.) 35; *Steinfield* v. *Levy*, 16 Abb. (N. S.) 26; *Walker* v. *Gregory*, 36 Ala. 180. See *ante*, Vol. 1, p. 725. Nor can an author recover for services rendered in writing an obscene book. *Poplett* v. *Stockdale*, 2 Carr. & P. 198; S. C., Ry. & Moo. 337. And in general, if a person knowingly contributes his services to an illegal or immoral purpose, he is debarred from recovering for the value of his services. *Pearce* v. *Brooks*, L. R., 1 Exch. 217. But it seems that if the labor is not *per se* illegal, but becomes so by the purpose to which it is applied, a recovery may nevertheless be had. Thus, a washerwoman who was employed generally to wash the clothes of a prostitute, was held

to be entitled to recover for her services in that respect; the court observing, that the plaintiff was employed generally to wash the defendant's linen, and *the use* which the defendant made of it cannot affect the contract. *Lloyd* v. *Johnson*, 1 Bos. & P. 340. See, also, *Hubbard* v. *Moore*, 24 La. Ann. 591; S. C., 13 Am Rep. 128; *Mahood* v. *Tealza*, 26 La. Ann. 108; 21 Am. Rep. 546.

Contracts which involve the doing of acts contrary to public policy are likewise invalid, and cannot be enforced. *Webber* v. *Blunt*, 19 Wend. 188; *Hennessey* v. *Hill*, 52 Ill. 281; *Bowman* v. *Coffroth*, 59 Penn. St. 19; *Powers* v. *Skinner*, 34 Vt. 274; *Odineal* v. *Barry*, 24 Miss. 9. And when a contract belongs to a class which is reprobated by public policy, it will be declared void, although in the particular instance no injury to the public may have resulted. The case must yield to the principle, not the principle to the case. *Firemen's Charitable Asso.* v. *Berghaus*, 13 La. Ann. 209. An agreement for compensation for services in procuring a government contract for another, by secret means or without disclosing the agency, is against public policy, and cannot be enforced. *Tool Company* v. *Norris*, 2 Wall. 45. But the employment of agents to negotiate contracts with the government is not *necessarily* illegal or against public policy. If fairly and honestly conducted, it is in harmony with the public interest, and of benefit to both contracting parties. *Winpenny* v. *French*, 18 Ohio St. 469. But all contracts for services in influencing public officers in the discharge of their duties are held to be void. *Weld* v. *Lancaster*, 56 Me. 453; *Hannah* v. *Fife*, 27 Mich. 172; *Hook* v. *Turner*, 22 Mo. 333; *Gulick* v. *Bailey*, 10 N. J. Law, 87; *Thomas* v. *Edwards*, 2 Mees. & W. 218; *United States* v. *Burns*, 12 Wall. 246. So, a contract for lobby services, for personal influence, for mere importunity to members of the legislature or other official body, for bribery or corruption, or for seducing or influencing them, by any other arguments, persuasions or inducements than such as bear directly and legitimately upon the merits of the pending application, is illegal, and against public policy and void. *Frost* v. *Belmont*, 6 Allen, 152; *Powers* v. *Skinner*, 34 Vt. 274; *McKee* v. *Cheney*, 52 How. (N. Y.) 144; *Marshall* v. *Baltimore, etc., Railroad Co.*, 16 How. (U. S.) 314. An agreement, express or implied, for purely professional services in such cases is valid. But when professional services are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. *Trist* v. *Child*, 21 Wall. 441.

Within the class of contracts invalid at common law, as inconsistent with sound policy and good morals, may be mentioned, by way of illus-

tration, an agreement to pay for suppressing evidence and compounding a felony (*Collins* v. *Blantern*, 2 Wils. 347; *Badger* v. *Williams*, 1 D. Chip. [Vt.] 137); to pay a person more than the legal fee for giving testimony (*Bayley* v. *Beaumont*, 11 Moore, 497; *Collins* v. *Godefroy*, 1 B. & Ad. 950), unless as an expert, where a previous examination is necessary (*Bastard* v. *Smith*, 10 Ad. & El. 213. And see *Patterson* v. *Donner*, 48 Cal. 369); to pay for resigning a public position to make room for another (*Eddy* v. *Capron*, 4 R. I. 395); to pay for promoting a marriage (*Scribblehill* v. *Brett*, 4 Br. P. C. 144; *Arundel* v. *Trevillian*, 1 Ch. R. 47; *Crawford* v. *Russell*, 62 Barb. 92); to pay for not bidding at a sheriff's sale of real property (*Jones* v. *Caswell*, 3 Johns. Cas. 29); to pay for not bidding for articles to be sold by the government at auction (*Doolin* v. *Ward*, 6 Johns. 194); to pay for not bidding for a contract to carry the mail on a specified route (*Gulick* v. *Bailey*, 5 Halst [N. J.] 87); to pay for not bidding for a contract for public work of any kind (*Gibbs* v. *Smith*, 115 Mass. 592; *Breslin* v. *Brown*, 24 Ohio St. 565; S. C., 15 Am. Rep. 627; *King* v. *Winants*, 71 N. C. 469; S. C., 17 Am. Rep. 11; *Woodworth* v. *Bennett*, 43 N. Y. [4 Hand] 273; S. C., 3 Am. Rep. 706); to pay for influencing the disposition of property by will in a particular manner (*Debenham* v. *Ox*, 1 Ves. 276); to pay for procuring signatures to a petition to the governor for a pardon (*Hatzfield* v. *Gulden*, 7 Watts [Penn.], 152); to pay a person for his aid and influence in procuring an office, and for not being a candidate himself (*Gray* v. *Hook*, 4 N. Y. [4 Comst.] 449); to pay for services in procuring a loan, when such services are a mere cover for a usurious contract (*Cook* v. *Phillips*, 56 N. Y. [11 Sick.] 310); to convey and assign a part of what should come from an ancestor by descent, devise, or distribution (*Boynton* v. *Hubbard*, 7 Mass. 112); to permit a person to personate another in business where the business is one that requires a special skill, as a physician (*Jerome* v. *Bigelow*, 66 Ill. 452; S. C., 16 Am. Rep. 597); to pay for services rendered as a soldier in the army of a country at war with the government (*Lance* v. *Hunter*, 72 N. C. 178; 21 Am. Rep. 454); to pay for support given to a candidate for office (*Swayze* v. *Hull*, 3 Halst. [N. J.] 54); to induce a candidate for office to withdraw (*Robinson* v. *Kalbfleisch*, 2 Hun [N. Y.], 683; S. C., 5 N. Y. Sup. [T. & C.] 212); to pay a creditor for not opposing the discharge of a debtor under bankrupt or insolvent laws (*Jackson* v. *Davison*, 4 B. & Ald. 695; *Trumball* v. *Tilton*, 21 N. H. 128); or an agreement by an unlicensed person to do an act for the doing of which a license is required. *Gas-light and Coke Co.* v. *Turner*, 5 Bing. N. C. 666. But it is held, that an agreement to pay a given sum of money to one who should

present a petition or proposition to the directors of a railroad company for the location of the depot on certain land, the money to be paid on location of the depot and completion of the road, is not void as against public policy, unless it appear that sinister, extraneous, or corrupting influences were brought to bear on the company to superinduce the location. *Workman* v. *Campbell*, 46 Mo. 305. So, a contract to procure a substitute for a man drafted for military service is valid. But an agreement to furnish a substitute "or otherwise clear him from said draft," is contrary to public policy and therefore void. *O'Hara* v. *Carpenter*, 23 Mich. 410; S. C., 9 Am. Rep. 89.

§ 6. **Validity under statutes.** A contract forbidden by statute, either expressly or by implication, is invalid, and cannot be enforced. See *Stanley* v. *Nelson*, 28 Ala. 514; *Bank of Rutland* v. *Parsons*, 21 Vt. 199; *Nourse* v. *Pope*, 13 Allen, 87; *Hill* v. *Mitchell*, 25 Ga. 704. Nor does it make any difference, in this respect, that since the contract was made the statute has been repealed (*Gilliland* v. *Phillips*, 1 S. C. 152; *Banchor* v. *Mansel*, 47 Me. 58); for the validity of a contract is to be determined by the state of the law at the time it was entered into. *Murrell* v. *Jones*, 40 Miss. 565; *McCauley* v. *Brooks*, 16 Cal. 11; *Mays* v. *Williams*, 27 Ala. 267. And where a party agrees to do a thing which is lawful at the time, and it afterward becomes unlawful by statute, the statute avoids the promise, or, as it is expressed in some of the cases, "repeals the covenant." *Bradford* v. *Jenkins*, 41 Miss. 328. But it has been held, that a contract to do a thing prohibited by statute, if not immoral or against public policy, is not necessarily void if the statute visits the unlawful act with a penalty. *Harris* v. *Runnels*, 12 How. (U. S.) 79. And see *Lester* v. *Howard Bank*, 33 Md. 558; 3 Am. Rep. 211. And it has likewise been held that contracts, whose consideration is morally good, as between the parties, but made while the prohibitory statute was in force, are made valid by the repeal of the statute. *Central Bank* v. *Empire Stone Dressing Co.*, 26 Barb. 23. See *Washburn* v. *Franklin*, 35 Barb. 599; 13 Abb. 140; *Hoppock* v. *Stone*, 49 id. 524.

Where a statute makes it unlawful to perform labor upon the Sabbath day, and no exception is made in favor of works of necessity, an agreement to perform such labor is without validity and no damages can be recovered for its breach. *Bernard* v. *Lupping*, 32 Mo. 341; *Slade* v. *Arnold*, 14 B. Monr. (Ky.) 232. But if the statute merely prohibits *unnecessary* labor, a recovery may be had for work which was *necessary* to be done. *Whitcomb* v. *Gilman*, 35 Vt. 297. The plaintiff must, however, show that his case falls within the exceptions of the statute, and the burden of proof is upon him to establish it.

Sayre v. *Wheeler*, 32 Iowa, 559. Works of necessity, within the meaning of the statute, are not generally limited to labor for the preservation of life, health or property from impending danger. The necessity may grow out of, or indeed be incident to, the general course of trade or business, or even be an exigency of a particular trade or business, and yet be within the exception of the statute. Thus, the danger of navigation being closed, may make it lawful to load a vessel on Sunday, if there is no other time to do so. *McGatrick* v. *Wason*, 4 Ohio St. 566. So too it may be lawful to keep a blast furnace at work on Sunday, and under special circumstances, a mill may grind on that day. And a gas company may supply gas, a water company, water, and a dairyman, milk, to their respective customers, on that day. See Id. So, labor necessary to prevent a great waste of sap in making maple sugar was held to be "work of necessity." *Whitcomb* v. *Gilman*, 35 Vt. 297. But it was held under the Arkansas statute, that a person was not justified in cutting his wheat on Sunday though it was wasting from over ripeness, and although he had no implements of his own to cut it, and was too poor to buy and could borrow none till Saturday night. *State* v. *Goff*, 20 Ark. 289. And the clearing out of a wheel-pit on Sunday, for the purpose of preventing the stoppage, on a week day, of mills which employed many hands, was held to be unjustifiable under the Massachusetts statute. *McGrath* v. *Merwin*, 112 Mass. 467; S. C., 17 Am. Rep. 119. It was likewise held unlawful for farmers, holding a license from the owner of a beach, for which they paid, to gather seaweed therefrom on Sunday, although it had just been cast up and would be floated away unless gathered at once. *Commonwealth* v. *Sampson*, 97 Mass. 407. And see *Jones* v. *Andover*, 10 Allen, 18. A contract for work and labor, to be void under the New York statute relative to the observance of Sunday, must be expressly and altogether for an act which the law forbids. It must be a contract for servile labor to be performed on Sunday exclusively and expressly, and not on any other day. *Merritt* v. *Earle*, 31 Barb. 38; S. C., 29 N. Y. (2 Tiff.) 115; *People* v. *Young Men's Father Matthew Benevolent Society*, 65 Barb. 357. A contract to publish an advertisement in a newspaper issued on Sunday, is an agreement to do an act prohibited by the statute, and the price stipulated for the service cannot be recovered. *Smith* v. *Wilcox*, 25 Barb. 341; S. C. affirmed, 24 N. Y. (10 Smith) 353. But see Laws 1871, ch. 702.

A contract for services is not rendered void merely because the person *knew* that they were intended to be applied to an unlawful purpose, provided the usual and ordinary purposes to which the product of such labor is applied is lawful. *Lewis* v. *Davison*, 4 M. & W. 654;

Tracey v. *Talmage*, 14 N. Y. (4 Kern.) 162. In other words, services lawful *per se* do not ordinarily become unlawful because the person rendering them knew that the person for whom they were rendered, intended to apply them to an unlawful use; but, to render them unlawful, it must also appear that the services were to be performed directly in furtherance of an illegal or immoral object. *McGavock* v. *Puryear*, 6 Coldw. (Tenn.) 34; *Tatum* v. *Kelley*, 25 Ark. 209. Thus, it is no defense to an action for work and labor done and material furnished in fitting up a house, that the plaintiff knew at the time was to be used for gambling purposes. *Michael* v. *Bacon*, 49 Mo. 474; S. C., 8 Am. Rep. 138. So, a carpenter may recover for the value of labor and materials employed upon a building to be used as a bowling-alley, where such alleys are prohibited by statute, because the building may be used for lawful purposes. But for labor, and materials expended in the construction of the alley itself, there can be no recovery, the ordinary use of such an erection being unlawful *per se*. *Spurgeon* v. *McElwain*, 6 Ohio, 442. See, also, *Updike* v. *Campbell*, 4 E. D. Smith (N. Y.), 570. The feeding and training of a race-horse is not an immoral consideration, and will support an *assumpsit* to pay for the same, although racing is contrary to statute. *Maddox* v. *Thornton*, 2 Cranch (C. C.), 260.

There can be no recovery for services rendered in a business carried on without a license, contrary to statute. Thus, there can be no recovery for services rendered as an actor in an unlicensed theater. *De Begnis* v. *Armistead*, 10 Bing. 107. Nor can a clerk in a liquor-store, or a bar-tender in a hotel or saloon, recover for services rendered in respect to the sale of liquor without a license. *Badgely* v. *Beale*, 3 Watts (Penn.), 263. So, where it is required by statute that real estate brokers shall obtain a license, they can recover no commissions, unless properly licensed. *Duke of Brunswick* v. *Crowl*, 4 Exch. 492; *Costello* v. *Goldbeck*, 9 Phil. (Penn.) 158. And in general, where a license is required by statute to do a particular service, there can be no recovery, unless the person rendering the service has obtained the requisite license. *Chadwick* v. *Collins*, 26 Penn. St. 138; *The Pioneer*, Deady (U. S.), 72. And see *Allison* v. *Haydon*, 4 Bing. 619; *Bensley* v. *Bignold*, 5 B. & Ald. 340; *Collins* v. *Carnegie*, 1 Ad. & El. 695.

As a general rule, if a statute prohibits a transaction without declaring it void, if done in violation of the statute, it is void. See *Wetherell* v. *Jones*, 3 Barn. & Ad. 221; *Vining* v. *Bricker*, 14 Ohio St. 331; *Coburn* v. *Odell*, 30 N. H. 540; *Harris* v. *Runnels*, 12 How. (U. S.) 79. Thus, where the operating of a threshing machine was, by statute, made a misdemeanor, unless certain precautions were

made use of to prevent injuries, it was held that no recovery could be had upon a promise, express or implied, the consideration of which was threshing performed with a machine not protected as required by the statute. *Ingersoll* v. *Randall*, 14 Minn. 400. See, also, *Solomon* v. *Dreschler*, 4 id. 279. So, a contract to let a horse on Sunday is void, where a statute prohibits the letting of horses on that day, and no recovery can be had thereon. *Tillock* v. *Webb*, 56 Me. 100. But a statute merely prohibiting one of the parties from doing an act, and imposing a penalty upon him in case he does it, will not invalidate an act for the doing of which the penalty is imposed, provided it appear from the fair construction of the statute, that the penalty was intended as a measure of the punishment for its violation. *Bemis* v. *Becker*, 1 Kan. 226; *Griffith* v. *Wells*, 3 Denio, 226; *Rossman* v. *McFarland*, 9 Ohio St. 369. Thus, if a statute enact as one of the means of raising a revenue, that those engaged in a particular occupation shall take out a license and pay a certain sum for it, or be subject to the payment of a greater sum, by way of penalty, for neglecting to do so, the only consequence that follows the neglect or omission is the liability to the penalty. *Smith* v. *Mawhood*, 14 Mees. & W. 452; *Hall* v. *Bishop*, 3 Daly (N. Y.), 109. So, where a statute imposed a penalty upon any person who should sell or lease a lot in any city or town, until the plat thereof had been duly acknowledged and recorded, it was held, that the penalty imposed upon the seller was the measure of punishment, and that the sale and deed of a lot, the plat of which was not recorded, were valid. *Watrous* v. *Blair*, 32 Iowa, 58.

A contract for the erection of a building in contravention of a statute, or in violation of municipal regulations, is void, and no recovery can be had either for labor or materials. *Stevens* v. *Gourley*, 7 C. B. (N. S.) 99. If, however, a building is so erected, but without any intention to infringe the law, and it can be modified so as to conform thereto, a recovery may be had. *Cubitt* v. *Smith*, 11 L. T. (N. S.) 298.

A contract which contemplates the rendition of legal services only, is not rendered invalid from the mere fact that illegal services were performed under it. Thus, one employed as a clerk in a hotel may recover the contract price of his services, although, in addition to his services as clerk, he sometimes sold liquor for his employer, contrary to law. See *McGehee* v. *Lindsay*, 6 Ala. 16; *Leavitt* v. *Palmer*, 3 N. Y. (3 Comst.) 19. So, if a father hire out the services of a minor son, to be engaged in a lawful occupation, and the son is employed in selling liquor, contrary to law, without the knowledge or consent of the father, the father may recover compensation for the services rendered. *Emery* v. *Kempton*, 2 Gray, 257.

§ 7. **Form and requisites.** See *ante*, Vol. 1, pp. 112 *et seq.* Where the mode in which a contract shall be made is prescribed by statute, any substantial deviation therefrom will render the contract void. But a deviation, merely as respects the *form* of the contract, and not operating injuriously, will not have this effect. *Crown* v. *United States*, Dev. (Ct. Cl.) 44, 45.

§ 8. **Effect of statute of frauds.** A contract for personal services, which by the terms of the contract cannot be performed in one year, is within the statute of frauds, and is required to be in writing. In some of the States, the statute merely provides that no action shall be brought upon such a contract, unless it be in writing (see *King* v. *Welcome*, 5 Gray, 41), while in other States, it is declared to be absolutely void. See *Nones* v. *Homer*, 2 Hilt. (N. Y.) 116. On this point the statute of the particular State, and the decisions of the courts giving construction thereto, should be consulted.

The statute, as very generally interpreted by the courts, does not include agreements which may or may not be performed within one year from the making, but merely those which by their very terms, and consistent with the rights of the parties, *cannot be performed* within that time. If the agreement may consistently with its terms be entirely performed within the year, although it may not be probable or expected that it will be performed within that time, it is not within the condemnation of the statute. *Wells* v. *Horton*, 4 Bing. 40; *Doyle* v. *Dixon*, 97 Mass. 208; *Heath* v. *Heath*, 31 Wis. 223; *Knowlman* v. *Bluett*, L. R., 9 Exch. 1; 7 Eng. R. 287; *Gault* v. *Brown*, 48 N. H. 183; 2 Am. Rep. 210. Thus, an agreement for work and labor to be paid for at the death of the employer, is held not to be within the statute. *Kent* v. *Kent*, 62 N. Y. (17 Sick.) 560; S. C., 20 Am. Rep. 502; *Updike* v. *Ten Broeck*, 32 N. J. Law, 105; *Riddle* v. *Backus*, 38 Iowa, 81. And so of an agreement to reward the services rendered, by testamentary bequest. *Jilson* v. *Gilbert*, 26 Wis. 637; S. C., 7 Am. Rep. 100. And although it be optional with one of the parties, whether he perform within the year or not, the contract is not within the statute. *Kent* v. *Kent*, 18 Pick. 569. So, an agreement for a year's service, where the time is not fixed when it shall commence is not within the statute, since it may commence immediately. *Russell* v. *Slade*, 12 Conn. 455; *Plimpton* v. *Curtiss*, 15 Wend. 336; *Linscott* v. *McIntire*, 15 Me. 201. And a contract of hiring for a year's service, the service to commence on the very next day after the making of the contract, was held not to be within the statute. *Cawthorne* v. *Cordrey*, 13 C. B. (N. S.) 406. But an agreement made on the 20th of July for a year's service to com-

mence on the 24th of July was held to be within the statute. *Snelling* v. *Lord of Huntingfield*, 1 Cr. M. & R. 20. See, also, *Bracegirdle* v. *Heald*, 1 B. & Ald. 722; *Scoggin* v. *Blackwell*, 36 Ala. 351; *Kelly* v. *Terrell*, 26 Ga. 551; *Nones* v. *Homer*, 2 Hilt. (N. Y.) 116. And, as a general rule, where an agreement distinctly shows upon the face of it that the parties contemplated its performance to extend over a greater space of time than one year, *for however short a period*, it is within the statute. Id.; *Harris* v. *Porter*, 2 Harr. (Del.) 27; *Comstock* v. *Ward*, 22 Ill. 248; *Cherry* v. *Heming*, 4 Exch. 631. See *Kleeman* v. *Collins*, 9 Bush (Ky.), 460. And the fact that a part performance is, by the agreement, to be made within the year, does not take the contract out of the statute. *Herrin* v. *Butters*, 20 Me. 119; *Hinckley* v. *Southgate*, 11 Vt. 428; *Holloway* v. *Hampton*, 4 B. Monr. (Ky.) 415. A contract to labor for three years, at specified wages per day (*Tuttle* v. *Swett*, 31 Me. 555); or a contract for several years with annual payments, is within the statute. *Birch* v. *Earl of Liverpool*, 9 B. & C. 392. So, if one person loans another a certain sum of money, as £100, and the person to whom it is loaned agrees to work it out at the rate of £60 a year, it is an agreement within the statute. *Currie* v. *McLane*, 2 Macph. (Sc.) 1076. See, also, *Swift* v. *Swift*, 46 Cal. 266.

But, a contract to work for another as long as they are mutually satisfied, is not within the statute. *Greene* v. *Harris*, 9 R. I. 401. So an agreement to labor for a company "for the term of five years, or so long as A shall continue to be agent of the company," was held not to be within the statute, as the agreement might have been fully performed within one year. *Roberts* v. *Rockbottom Co.*, 7 Metc. (Mass.) 46. And see *Hodges* v. *Richmond Manuf. Co.*, 9 R. I. 482. So, in *Wilhelm* v. *Hardman*, 13 Md. 140, a contract made by an infant to work until he should attain the age of twenty-one, which would not occur for seven years, for his board, was held not to be within the statute. But see *Squire* v. *Whipple*, 1 Vt. 69.

Where a person has entered upon the performance of a contract, void under the statute of frauds, and the other party, after having derived a benefit from the contract, refuses to perform, he must pay for what benefit he has received upon a *quantum meruit*. *King* v. *Welcome*, 5 Gray, 41; *Lockwood* v. *Barnes*, 3 Hill (N. Y.), 128; *Clark* v. *Terry*, 25 Conn. 395; *Ray* v. *Young*, 13 Tex. 550; *Sims* v. *McEwen*, 27 Ala. 184. But in such cases the contract does not control, nor is it generally admissible in evidence to establish the value of the services. *Lang* v. *Henry*, 54 N. H. 57. See *Carter* v. *Brown*, 3 S. C. 298. And it has been held, that, if a person enters into a verbal contract to labor for more than one year, and quits before the end of

the term without a sufficient legal excuse, and the other party was willing to perform on his part, the former can recover nothing for the services rendered. *Swanzey* v. *Moore*, 22 Ill. 63; *Mack* v. *Bragg*, 30 Vt. 571. For a fuller discussion of this subject, see title *Frauds, Statute of*, as a defense.

§ 9. **Professional services.** One who offers himself for employment in a professional capacity undertakes, *First*, that he possesses that reasonable degree of learning and skill which is ordinarily possessed by the professors of the same art or science, and which is ordinarily regarded by the community, and by those conversant with the employment, as necessary to qualify him to engage in such business; *Second*, that he will use reasonable and ordinary care and diligence in the exercise of his skill and the application of his knowledge, to accomplish the purpose for which he is employed; and *Third*, that he will use his best judgment in the exertion of his skill and the application of his diligence. *Patten* v. *Wiggin*, 2 Am. Law Reg. (N. S.) 403; *Carpenter* v. *Blake*, 10 Hun (N. Y.), 358; *Briggs* v. *Taylor*, 28 Vt. 180; *Tefft* v. *Wilcox*, 6 Kan. 46; *McNevins* v. *Lowe*, 40 Ill. 209. The degree of knowledge and skill required is that ordinarily possessed by the profession as a body, and not a standard of skill measured by comparison with those standing highest, nor by those standing lowest, in the profession, but such as *averages* with the knowledge and skill generally possessed by a majority of the profession. Id. See, also, *Hathorn* v. *Richmond*, 48 Vt. 557; *Geiselman* v. *Scott*, 25 Ohio St. 86. But the fact that a professional man, as a surgeon or physician, has asked and received no pay for his services, does not relieve him from liability for injuries resulting from his failure to exercise the ordinary care and skill of his profession (*Baird* v. *Gillett*, 47 N. Y. [2 Sick.] 186; *McNevins* v. *Lowe*, 40 Ill. 209); yet, if the patient neglect to obey the reasonable instructions of the surgeon or physician, and thereby contributes to the injury complained of, he can recover nothing for such injury. *Hibbard* v. *Thompson*, 109 Mass. 286; *Scudder* v. *Crossan*, 43 Ind. 343. And see *post*, title *Negligence*.

Where a party, knowingly and without objection, permits another to render service for him of any kind whatever, the law implies a promise to pay what the same is reasonably worth. Thus, a physician who is called to a consultation by an attending physician for his own benefit, in accordance with an agreement between the latter and his employer that the attending physician shall pay the expense of the consultation, can recover for his services from the employer under an implied contract, notwithstanding the agreement. *Shelton* v. *Johnson*, 40 Iowa, 84.

In England, prior to the enactment of the statute of 21 & 22 Vict.,

ch. 90, a physician, or medical practitioner who affected to be a physician, had no remedy at law to recover his fees (*Lipscombe* v. *Holmes*, 2 Camp. 441; *Chorley* v. *Bolcot*, 4 Term R. 317), unless he could prove that there was an actual contract for his remuneration. *Veitch* v. *Russell*, 3 Q. B. 928. The presumption was, that he acted only with a view to an honorary reward. *Poucher* v. *Norman*, 3 B. & C. 745. But if he acted both as physician and surgeon, he could recover for services rendered in the latter capacity (*Battersby* v. *Lawrence*, Carr. & M. 277), and a physician registered under the act above mentioned, may now recover his fees in all cases. *Gibbon* v. *Budd*, 2 H. & C. 92.

In this country, physicians and surgeons are permitted to enjoy the benefit of that great principle of the common law, that when services are performed on request, and no agreement is made in respect to them, the law raises an implied promise, to pay so much as the person performing them deserves to have; and when there is no statutory restraint upon the remedy, an action lies on such promise. *Hewitt* v. *Wilcox*, 1 Metc. (Mass.) 154; *Bronson* v. *Hoffman*, 7 Hun (N. Y.), 674; *Mooney* v. *Lloyd*, 5 Serg. & R. 416. Physicians are likewise entitled to recover for the services of their students in attendance upon their patients. *Warring* v. *Monroe*, 4 Wend. 200. And a physician may support his demand by his book of original entries and his own oath. *Smith* v. *Hyde*, 19 Vt. 54; *Simmons* v. *Means*, 8 Sm. & M. (Miss.) 397; *Thompson* v. *Hazen*, 25 Me. 104.

Where a statute makes the taking out of a license necessary to the right of a physician to recover for his services, he cannot recover for medical attendance, although he administers medicines for which he has obtained a patent (*Jordon* v. *Dayton*, 4 Ohio, 294; *Smith* v. *Tracy*, 2 Hall [N. Y.], 465), or merely uses vegetable remedies of domestic origin. *Bailey* v. *Mogg*, 4 Denio, 60.

As to the contracts, liabilities, etc., of attorneys, see *ante*, Vol. 1, title *Attorneys*.

§ 10. **Scientific and artistic services.** The hiring of scientific and artistic services is governed by the same general principles of law that are applicable to contracts of hire of other services. The law implies a contract on the part of the person hired, that he will perform the service skillfully. See *Rodgers* v. *Grothe*, 58 Penn. St. 414. It is held that an architect by profession is competent to testify in his own behalf to the value of his labor in drawing plans. *Nourry* v. *Lord*, 2 Keyes, 617; S. C., 3 Abb. Ct. App. 392. But one who invites proposals or offers from architects for the erection of a building, or of engineers for the construction of bridges or other works, is not bound,

at all events, to employ the party who offers to do the work at the lowest price, nor in default of such employment, is he liable to pay such party for his time, labor, and services, in deliberating upon the plans, specifications, etc., with a view to prepare himself to make such offer. *Topping* v. *Swords*, 1 E. D. Smith (N. Y.), 609; *Palmer* v. *Haverhill*, 98 Mass. 487. There is no principle of law by which a promise to pay can be implied under such circumstances. Id.

§ 11. **Mechanical services.** Where mechanical services upon a chattel are the subject of hire, and the chattel is intrusted to the workman, he becomes a bailee of the property to be worked upon, and is liable for ordinary neglect. *McCaw* v. *Kimbrel*, 4 McCord (S. C.), 220; *Morse* v. *Androscoggin R. R. Co.*, 39 Me. 285; *Gamber* v. *Wolaver*, 1 Watts & Serg. 60. And he is answerable, although his employer accepts the work without objection at the time. *Chambers* v. *Crawford*, Add. (Penn.) 151. His relation to the employer or bailor is personal, and grows out of the confidence the bailor is presumed to repose in the skill and fidelity of his bailee when intrusting his property to him for the service intended to be performed on or toward it. And the law implies a contract on the part of the bailee to perform the service skillfully, and then to return the chattel faithfully on payment for his service. *Rodgers* v. *Grothe*, 58 Penn. St. 414.

Thus, a watchmaker who receives a watch to repair for hire, is bound to use ordinary diligence for the safe-keeping of the watch, and if it is stolen, while in his custody, through his negligence, he will be liable. And, in such case, a demand before suit is not necessary. *Halyard* v. *Dechelman*, 29 Mo. 459. So, a miller is bound to exercise reasonable care and diligence for the preservation of grain left at his mill to be ground, and to return it on demand; and the fact that he was not notified that the wheat was so left, will not discharge his liability. *Spangler* v. *Eicholtz*, 25 Ill. 297. See, also, *Wallace* v. *Canaday*, 4 Sneed (Tenn.), 364.

Where a mechanic injures the materials furnished him, or wastes them, he must account to his employer for their original value, less what may be realized from their sale for any purpose whatsoever, if retained by the employer. *Hillyard* v. *Crabtree*, 11 Tex. 264.

Where a bailee was engaged in building cars for a railway company, which was to furnish certain parts necessary to their completion, and these were not furnished promptly, and during the consequent delay the cars were destroyed by fire, it was held to be the bailee's loss, and that he could recover nothing for his labor. *McConihe* v. *New York, etc., R. R. Co.*, 20 N. Y. (6 Smith) 495. So, a bailee who had a boat in his possession for repairs, was held answerable for damages sustained

by ice, where he carelessly launched the boat at a time when danger from such a source might easily have been foreseen. *Smith* v. *Meegan*, 22 Mo. 150. And where goods stored for hire were carelessly injured by oil, and afterward nearly ruined by a flood, against which the warehouseman took all precautions, it was held, that the warehouseman was, nevertheless, liable for the injury occasioned by the oil. *Powers* v. *Mitchell*, 3 Hill, 545. And see *Francis* v. *Castleman*, 4 Bibb (Ky.), 282; *Pattison* v. *Wallace*, 1 Stew. (Ala.) 48. But where a bailee for hire to whom cotton was delivered to gin, removed the cotton from the gin-house, and left it in a field, and permitted it to go to waste, moved by well grounded and real fears that unless he did so, an armed force of soldiers, in accordance with previous threats, would return and burn his gin-house and the cotton in it, or inflict upon him bodily violence, or both, and he was without the means of preventing or resisting the threatened violence,—he was held not to be chargeable for the removal and waste of the cotton. *Waller* v. *Parker*, 5 Coldw. (Tenn.) 476.

A bailee who holds a chattel for the purpose of performing work upon it for a compensation, has a special property in it, while the general property remains in the bailor. Thus, a bailee of yarn, who is to procure it to be made into cloth for a commission, has a special property in the yarn, and may maintain an action against any one who wrongfully takes it from his servant, to whom he delivers it to be woven. *Eaton* v. *Lynde*, 15 Mass. 242. And a bailee of skins to be tanned by him, may maintain trespass against those who take them from him before he has finished his labor on them, without paying for what he has done, although they were taken by the bailor's order. *Burdict* v. *Murray*, 3 Vt. 302. But if after the completion of his work the bailee delivers it to a common carrier for the general owner, he loses his special property, and can maintain no action against the carrier for the loss of the goods. *Morse* v. *Androscoggin R. R. Co.*, 39 Me. 285.

It has likewise long been settled, at common law, that every bailee for hire, who by his labor or skill imparts additional value to the goods, has a lien thereon for his reasonable charges, there being no special contract inconsistent with such lien. *Blake* v. *Nicholson*, 3 Maule & S. 168; *Crawshay* v. *Homfray*, 4 Barn. & Ald. 50. This includes all who take property in the way of their trade or occupation, to bestow labor or expense upon it; and the lien extends to all the goods delivered under one contract, and is not confined to the particular portion on which the labor has been bestowed. *Morgan* v. *Congdon*, 4 N. Y. (4 Comst.) 552. But, at common law, the lien of a bailee for services

lasts only while he retaines the possession. *Rodgers* v. *Grothe*, 58 Penn. St. 414. By voluntarily relinquishing the possession of the subject his lien is lost (*Cardinal* v. *Edwards*, 5 Nev. 36); and if he sells or pawns it he is guilty of a breach of his fidelity to the bailor, and at once forfeits his right of lien. *Rodgers* v. *Grothe*, 58 Penn. St. 414. See *Whitlock* v. *Heard*, 13 Ala. 776. Thus, a bailee employed to run timber to market, who wrongfully sells it on the way, has no lien for his hire and expenses. *Davis* v. *Bigler*, 62 Penn. St. 242; S. C., 1 Am. Rep. 393.

§ 12. **Ordinary and domestic services.** By the common law, servants were divided into classes, or grades. Those employed for domestic purposes, were called menial servants, or domestics; a definition which applies to gardeners, grooms and others, if they reside within the curtilage or domain of their master, though not actually in his house (1 Broom & Had. Comm. [Wait's ed.] 329; *Nowlan* v. *Ablett*, 2 Cr. M. & R. 54); and also to a huntsman, though not residing within the curtilage. *Nicoll* v. *Greaves*, 17 C. B. (N. S.) 27. The contract between a menial servant and his master arises upon the hiring, and may be either expressed in terms, or implied by custom. *Metzner* v. *Bolton*, 9 Exch. 518. In England, if the hiring be general without any particular time expressly or impliedly limited, the law construes it to be a hiring for a year, subject, however, by custom to the condition that it may be determined by either party, on giving a month's notice or paying a month's wages. *Robinson* v. *Hindman*, 3 Esp. 235; *Turner* v. *Mason*, 14 Mees. & W. 112. This custom is, however, strictly confined to menial servants, and does not apply to those occupying a superior position, such as that of governess (*Todd* v. *Kerrich*, 8 Exch. 151), clerk (*Beeston* v. *Collyer*, 4 Bing. 309), housekeeper of a large hotel (*Lawler* v. *Linden*, 10 Ir. R., C. L. 188), or warehouseman (*Fawcett* v. *Cash*, 5 B. & Ad. 904); nor to those whose situation is not domestic, such as a laborer in husbandry, or a farm bailiff. *Nicoll* v. *Greaves*, 17 C. B. (N. S.) 27, 31. And see *Boniface* v. *Scott*, Serg. & R. 352; *Ex parte Meason*, 5 Binn. 167.

In this country, the courts observe no distinction between domestic servants and any other class of laborers for hire. In relation to hiring, it is always a question of fact whether there was a hiring, and if so, for what length of time, and upon what terms; and the rights of the parties are then governed by the general rules of law applicable to all other contracts. See *post*, title *Master and Servant*; *Haskins* v. *Royster*, 70 N. C. 601; S. C., 16 Am. Rep. 780; *Walker* v. *Cronin*, 107 Mass. 555. But see *Burgess* v. *Carpenter*, 2 S. C. 7; S. C., 16 Am. Rep. 643.

Where one man employs a laborer to work on his farm, and an-

other man, knowing of such contract of employment, entices, hires, or persuades the laborer to leave the service of his first employer during the time for which he was so employed, the law gives to the party injured a right of action to recover damages. *Jeter* v. *Blocker*, 43 Ga. 331; *Haight* v. *Badgeley*, 15 Barb. 499; *Jones* v. *Stanly*, 76 N. C. 355; *Bixby* v. *Dunlap*, 56 N. H. 456; *Daniel* v. *Swearengen*, 6 S. C. 297. See, also, the cases cited above.

§ 13. **Discharge of servant for cause.** Every contract for the hire of services, whether for a month, a year, a definite or indefinite time, is subject to the right of the employer to discharge the employee for sufficient cause; and if sufficient cause for dismissal exists against the employee, it is a forfeiture of future salary. *Harrington* v. *First National Bank of Chittenango*, 1 N. Y. Sup. (T. & C.) 361. Nor is it necessary that the discharge be made at the precise time of the misconduct, nor that the grounds for the discharge be stated (id.); or even known by the employer, if a good cause of discharge in fact exists at the time of the discharge. *Willets* v. *Green*, 3 Carr. & K. 59. And it has been held, in England, that if a party hired for a certain time so conduct himself as to justify his discharge, he shall forfeit the current salary even for the time for which he has served. *Turner* v. *Robinson*, 5 Barn. & Ad. 789. See, also, *Lilley* v. *Elwin*, 11 Q. B. 742; *Baillie* v. *Kell*, 4 Bing. N. C. 638; *Amor* v. *Fearon*, 9 Ad. & El. 551; *Beach* v. *Mullin*, 5 Vroom (N. J.), 343. But, in this country, it has been repeatedly held that although the person hired for a stated period be discharged for good cause, he may still recover on a *quantum meruit* for the services actually rendered. *Lawrence* v. *Gullifer* 38 Me. 532; *Jones* v. *Jones*, 2 Swan (Tenn.), 605; *Eaken* v. *Harrison*, 4 McCord (S. C.), 249; *Robinson* v. *Sanders*, 24 Miss. 391; *Swift* v. *Harriman*, 30 Vt. 607. But see *Libhart* v. *Wood*, 1 Watts & Serg. 265; *Henderson* v. *Stiles*, 14 Ga. 135.

It has been held that to justify a discharge, there must be, on the part of the servant, either moral misconduct, pecuniary or otherwise, willful disobedience, or habitual neglect. *Callo* v. *Brouncker*, 4 Carr. & P. 518. But this doctrine has been denied in more recent cases, and it is now held that misconduct may be sufficient to justify a discharge although it does not include moral turpitude. *Smith* v. *Thompson*, 8 Com. B. 44. And it is said, that whether or not a servant in any particular case was rightfully discharged must, of course, depend upon the nature of the service which he was engaged to perform, and the terms of his engagement. Sm. Mast. & Ser. 69; *Horton* v. *McMurtry*, 5 H. & N. 674; *Lacy* v. *Osbaldiston*, 8 Carr. & P. 80. Thus, where a salesman unknown to his employers sold goods to a firm in

which he was a partner, and for that cause was discharged, the discharge was justified upon the ground that such sales were inconsistent with his duties to his employers, and the law would presume that they were injurious to them. *McDonald* v. *Lord*, 2 Rob. (N. Y.) 7; S. C., 26 How. 404; *Dieringer* v. *Meyer*, 42 Wis. 311. So where a servant was discharged for trespassing upon the premises of a third person, it was held a sufficient ground for discharge, although no damage resulted from the trespass. *Read* v. *Dunsmore*, 9 Carr. & P. 588. And the clerk of a railway company was held to have been rightfully discharged, for disclosing the accounts of the company to a person connected with another company. *East Anglian Railway Co.* v. *Lythgoe*, 10 Com. B. 726; S. C., 2 L. M. & P. 221. And a person engaged as a theatrical performer may be lawfully discharged for being guilty of indecent and immoral conduct, so gross as to cause the other members of the company to refuse to associate with her, and so open as to become matter of public scandal, even although she fully performs all her theatrical duties. *Drayton* v. *Reid*, 5 Daly (N. Y.), 442. See, also, *Lacy* v. *Osbaldiston*, 8 Carr. & P. 80. But where a teacher of French and drawing was discharged for being absent four days without leave, it not having been shown that he was guilty of any immoral conduct during such absence, or that his employer sustained any damage by reason of his absence, the discharge was held to be wrongful. *Fillieul* v. *Armstrong*, 7 Ad. & El. 557. See *Robinson* v. *Hindman*, 3 Esp. 235; *Naylor* v. *Fall River Iron Works Co.*, 118 Mass. 317.

In general, a servant may be rightfully discharged, for any breach on his part, of an express or implied provision of the contract of hiring. Among the causes sufficient to justify a discharge are the following: The commission of a felony by the servant, although not immediately injurious to the person or property of his employer (*Libhart* v. *Wood*, 1 Watts & Serg. 265); using insolent language to the employer (*Beach* v. *Mullin*, 5 Vroom [N. J.], 343; *Champion* v. *Hartshorne*, 9 Conn. 570); or to members of the employer's family (*Shaw* v. *Charitie*, 3 Carr. & K. 25); refusing to obey a lawful order (*Turner* v. *Mason*, 14 Mees. & W. 112); being guilty of gross immorality, as having sexual intercourse with another servant (*Drayton* v. *Reid*, 5 Daly [N. Y.], 442; *Atkin* v. *Acton*, 4 Carr. & P. 208); habitual drunkenness (*Wise* v. *Wilson*, 1 Carr. & K. 662); *Gonsolis* v. *Gearhart*, 31 Mo. 585), or even a single act of drunkenness (*Johnson* v. *Gorman*, 30 Ga. 612); pregnancy on the part of an unmarried female servant (*Rex* v. *Brampton*, Cald. 11 *n*. And see *Rex* v. *Wilford*, id. 57); quarreling with another employee, and drawing a revolver in the store, in the presence of customers (*Kearney* v. *Holmes*, 6 La. Ann. 373); using obscene or

blasphemous language in the presence of the employer's family or other employees or servants (*Mattheson* v. *McKinnon*, 10 S. [Sc.] 825); disclosing the secrets of the employer's trade or business (*Turner* v. *Robinson*, 5 Barn. & Ad. 789); betraying the employer's confidence (*Beeston* v. *Collyer*, 2 Carr. & P. 609); wanton conduct or palpable inefficiency (*Callo* v. *Brouncker*, 4 id. 518); fraudulent conduct in respect to the employer's business (*Singer* v. *McCormick*, 4 Watts & Serg. 266); embezzling the employer's goods or money (*Spotswood* v. *Barrow*, 5 Exch. 110; *Brown* v. *Croft*, 6 Carr. & P. 16); habitual carelessness or negligence (*Cunningham* v. *Fonblanque*, id. 44); refusing to work at harvesting, unless the employer furnished beer (*Lilley* v. *Elwin*, 11 Q. B. 742); or engaging in business, injurious to the business of the employer. *Adams Express Co.* v. *Trego*, 35 Md. 47; *Dieringer* v. *Meyer*, 42 Wis. 311.

A neglect or refusal on the part of a servant to obey a lawful and reasonable command of the master is a good ground for his discharge. But it is otherwise, if the command be to do a fraudulent or unlawful act (*Rex* v. *Mutters*, 34 L. J. 54; *Colton* v. *Thompson*, 4 McQueen [Sc.], 424), or to perform service that is unreasonable. *Jacquot* v. *Bourra*, 7 Dowl. 348. So, although a servant is bound to the exercise of due care, and may rightfully be discharged for habitual negligence, yet he is not bound to preserve the master's property at all hazards, nor is he liable for ordinary accidents. *Nickson* v. *Brohan*, 10 Mod. 109; *Hathaway* v. *Smith*, 2 Tyler (Vt.), 248.

Where, by the terms of the contract of hiring, the employee is to receive no compensation until the end of the term of service, and the contract specially provides that if he fails to complete the term he shall forfeit his wages, or a portion thereof, if he is discharged for cause, before the end of the term, the forfeiture attaches, and he is not entitled to recover that portion of the wages embraced in the forfeiture. *Huntington* v. *Claflin*, 10 Bosw. (N. Y.) 262; S. C. affirmed, 38 N. Y. (11 Tiff.) 182; *Monkman* v. *Shepherdson*, 11 Ad. & El. 411. And where the plaintiff contracted to serve the defendant for a term, and agreed "to abstain entirely from all intoxication, and to forfeit his wages if he got drunk and was dismissed," and the plaintiff did get drunk repeatedly, and was at length discharged, — it was held, that the failure of the defendant to discharge the plaintiff when he first got drunk was no waiver of the agreement on the part of the defendant, and that the plaintiff was not entitled to recover on a *quantum meruit* for the time he had served. Id.; *Hunter* v. *Gibson*, 3 Rich. (S. C.) 161. If a servant has been guilty of misconduct, and the master, knowing it, retains him in his service, *prima facie*, it is a waiver, and a condonation is presumed. *Ridgway* v. *Hungerford Market Co.*, 3 Ad. & El. 171.

But if the circumstances of the case tend to establish a proper excuse for delay, condonation is a question of fact for the jury. *Baillie* v. *Kell*, 4 Bing. N. C. 63; *Harrington* v. *First National Bank*, 1 N. Y. Sup. (T. & C.) 363. And see *Thayer* v. *Wadsworth*, 19 Pick. 349. And a failure to discharge an unfaithful servant before his term of service has expired is not a release of damages arising from his torts or neglect. *Stoddard* v. *Treadwell*, 26 Cal. 294.

Where one enters into a contract and performs part, and then without cause and without the consent of the other party, abandons the performance, he forfeits all right to recover for what he has done. *Lantry* v. *Parks*, 8 Cow. 63. *Aaron* v. *Moore*, 34 Mo. 79; *Babbitt* v. *Riddell*, 1 Grant's (Penn.) Cas. 161. But the employer in such case may waive his right to insist upon such forfeiture, either by a tender of payment, or by an offer or promise to pay, after the other has quit his service. *Patnote* v. *Sanders*, 41 Vt. 66; *Boyle* v. *Parker*, 46 id. 343; *Hogan* v. *Titlow*, 14 Cal. 255. Or, the acts and declarations of the employer, recognizing a continued liability to the other party for his wages, after he has left his employment, may be competent testimony to show such waiver of the forfeiture. *Cahill* v. *Patterson*, 30 Vt. 592. But see *Dover* v. *Plemmons*, 10 Ired. (N. C.) 23; *Rice* v. *Dwight Manufacturing Co.*, 2 Cush. 80.

§ 14. **Leaving service for cause.** In every contract for the hire of services, there is an implied obligation on the part of the hirer to treat the servant humanely. And a servant is justified in leaving his master's employment if the master beats him, or otherwise treats him in a cruel and inhuman manner. *Winstone* v. *Linn*, 1 B. & C. 460; *McGrath* v. *Herndon*, 4 T. B. Monr. (Ky.) 480; *Warner* v. *Smith*, 8 Conn. 14. And so, if the master employs him in unlawful or unreasonable pursuits (*Commonwealth* v. *St. Germans*, 1 Browne [Penn.], 24; *Berry* v. *Wallace*, Wright [Ohio], 657), or subjects him to perils and dangers not ordinarily incident to the employment (*Paterson* v. *Wallace*, 1 Macq. H. L. Cas. 748; *Brydon* v. *Stewart*, 2 id. 30; *Wigmore* v. *Jay*, 5 Exch. 354; *Hallower* v. *Henley*, 6 Cal. 209; *Shanny* v. *Androscoggin Mills*, 66 Me. 420; *Haynes* v. *East Tenn. R. R. Co.*, 3 Coldw. [Tenn.] 222; *Fairbanks* v. *Haentzsche*, 73 Ill. 236); or if he subject the servant to demoralizing associations or influences. *Warner* v. *Smith*, 8 Conn. 14. If a servant is compelled to work on the Sabbath, it furnishes good cause for his leaving the service. But if he chooses to remain in the service and performs labor on that day, without any special request or promise on the part of the employer to pay for the same, no extra charge can be recovered therefor, although the work belonged to the class regarded as *necessary*. *Guthrie* v. *Merrill*, 4

Kan. 187. It is otherwise, however, if the employer specially requests the servant to perform, or agrees to pay him for the work, and there is nothing in the statute prohibiting it. *Whitcomb* v. *Gilman*, 35 Vt. 297; *People* v. *Young Men's Benevolent Society*, 65 Barb. 357.

A person who is employed by the month or year in a particular service may recover compensation for services rendered on request, out of the sphere of such employment, although there is no express agreement that he should be paid therefor. *Cincinnati, etc., Railroad Co.* v. *Clarkson*, 7 Ind. 595. And this is so, even where the contract provides that no allowance shall be made for extra work, if it is shown that the extra work was expressly authorized by the employer. *Duncan* v. *Board of Commissioners of Miami County*, 19 id. 154. But in order to render a promise to pay for extra work obligatory and binding, the promise must be for services which the servant is not bound to perform, as where he is subjected to risks not contemplated in the service for which he was employed, or where the service is to be rendered at a time when the master is not entitled to his service. *Stilk* v. *Myrick*, 2 Camp. 317; *Sweany* v. *Hunter*, 1 Murph. (N. C.) 181; *Henderson* v. *Burns*, 10 S. (Sc.) 467; *England* v. *Davidson*, 11 Ad. & El. 856. A promise to give extra compensation for merely rendering more than his ordinary share of service is void. *Luske* v. *Hotchkiss*, 37 Conn. 219; S. C., 9 Am. Rep. 314. See *Brooks* v. *Cotton*, 48 N. H. 50; S. C., 2 Am. Rep. 172.

A person hired for a special service may rightfully refuse to perform another and different service. *Baron* v. *Placide*, 7 La. Ann. 229. And see *Burton* v. *Pinkerton*, L. R., 2 Exch. 340; *Turner* v. *Mason*, 14 M. & W. 112. But a slight and casual departure from the usual service will not justify a refusal to perform, and the fact that a party who engages to labor for another, for a specified time, is called upon to perform severe or unpleasant labor, does not excuse him for leaving his work. *Angle* v. *Hanna*, 22 Ill. 429. So, every servant or employee is bound to guard his employer's interests, and in case of a sudden emergency in his business rendering it imperative that certain things should be promptly done, the servant cannot reasonably object to slight deviations from the usual routine of his engagement. See *Graddon* v. *Price*, 2 Carr. & P. 610. Thus, it is held that, even where there are special rules or customs to the contrary, yet in an emergency a servant would not be justified in refusing to work an hour or two beyond the usual time. *Reg.* v. *St. John Devizes*, 9 Barn. & C. 896. See, also, *Willson* v. *Simson*, 6 D. (Sc.) 1256. But deviations from the ordinary service, if often repeated, or if they impose additional risks, will sufficiently excuse a refusal to perform. Id.

A person employed to perform certain duties, at a fixed rate of compensation, cannot demand extra pay for increased services in that capacity, which were not anticipated at the time of the hiring. His salary is deemed to cover all services required of him in the particular employment in which he was engaged. *Carr* v. *Chartiers Coal Company*, 25 Penn. St. 337. And although it is a sufficient excuse for leaving the service, that the employer put the servant to other work than that specified in the contract, yet if the servant remains without objecting to the change of employment, and without any promise of increased pay, he can recover none. *Hair* v. *Bell*, 6 Vt. 35.

But where a person is employed as a man of all work, at a fixed weekly stipend, and during the sickness of the employer he takes care of him on alternate nights and Sundays, receiving pay for his services upon Sundays, but none for those services rendered at night, and there is no agreement as to such services, if the laborer recovers for such services in the court below the verdict and judgment will not be disturbed. *Wilford* v. *Devin*, 43 Iowa, 559.

It was formerly the English rule, that when a servant, hired for a term, died before the end of the term, no recovery could be had for the services actually rendered by him. *Countess of Plymouth* v. *Throgmorton*, Salk. 65. And see *Givhan* v. *Dailey*, 4 Ala. 336. But the rule is otherwise in this country, and a recovery may be had for the services actually rendered, and at the rate provided for in the contract. *Clark* v. *Gilbert*, 26 N. Y. (12 Smith) 279; *Yerrington* v. *Greene*, 7 R. I. 589. See *Green* v. *Gilbert*, 21 Wis. 395. And if the employer die, and the servant continues and completes his period of service, he may recover the sum agreed upon, notwithstanding the dissolution of the contract by the death of either party. Id.; *Hill* v. *Robeson*, 2 Sm. & M. (Miss.) 541.

Where the employer consents to a termination of the contract of hiring, he cannot set up a breach of the contract on account of the servant leaving before the end of the term (*Thomas* v. *Williams*, 1 Ad. & El. 685; *Patnote* v. *Saunders*, 41 Vt. 66); and such consent may be inferred from the acts or language of the employer. *Boyle* v. *Parker*, 46 id. 343. But the mere fact that the employer manifests a disposition to get rid of the servant, will not justify the latter in quitting the service; and if he leaves on that account, he can recover nothing for his services. *DeCamp* v. *Stevens*, 4 Blackf. (Ind.) 24.

§ 15. **Performance by servant.** In general, in case of an *entire* contract, the party claiming under it must show full performance. *Thayer* v. *Wadsworth*, 19 Pick. 349; *Jacks* v. *Phillips County*, 25 Ark. 64; *Sanderson* v. *Brown*, 57 Me. 308; *Bachman* v. *Myer*,

49 Cal. 220. But full performance is excused where rendered impossible by the act of God, or of the law, or of the other party to the contract. And it is held that sickness or death is an act of God in such a sense as generally to excuse a full performance of an entire contract, and to permit a recovery on a *quantum meruit.* See *Foster* v. *Watson*, 16 B. Monr. (Ky.) 377; *Lakeman* v. *Pollard*, 43 Me. 463; *Eaken* v. *Harrison*, 4 McCord (S.C.), 249; *Sugg* v. *Blow*, 17 Mo. 359. And see *ante*, 603, § 14. But it is otherwise where the sickness is one which should have been foreseen and provided against by the party in default. *Simmons* v. *Wilmott*, 3 Esp. 91. Where a man contracted to render the domestic services of himself and wife for one year at a specified price, and about four months thereafter the wife left service in anticipation of her confinement, when both were discharged from service, and the wife was confined in four or six weeks thereafter, he was not permitted to recover for the four months' service, as he could have foreseen the sickness. *Jennings* v. *Lyons*, 39 Wis. 553; S. C., 20 Am. Rep. 57. See *Massey* v. *Taylor*, 5 Coldw. (Tenn.) 447; *Hughes* v. *Wamsutta Mills*, 11 Allen, 201.

A person hired for a year, who is wrongfully dismissed by his employer before the expiration of the term, is not required to wait until the end of the year, but can sue at once, and is entitled to recover such damages as he has sustained by such wrongful dismissal. Or he may treat the contract as rescinded, and recover upon a *quantum meruit.* *Hoar* v. *Clute*, 15 Johns. 224; *Munroe* v. *Perkins*, 9 Pick. 298; *King* v. *Steiren*, 44 Penn. St. 99; *Fowler* v. *Armour*, 24 Ala. 194; *Brinkley* v. *Swicegood*, 65 N. C. 626. And since the employer ends the contract by his own act, he is entitled to no deduction from the actual value of the services, unless for injuries to his property caused by the tortious acts of the servant during the term. *Lawrence* v. *Gullifer*, 38 Me. 532. But where the service is terminated by the act of God, as by disease or death, the damages sustained by the employer by reason of the failure to perform are to be taken into account. *Hubbard* v. *Belden*, 27 Vt. 645; *Hillyard* v. *Crabtree*, 11 Tex. 264. And see *Blodgett* v. *Berlin Mills Co.*, 52 N. H. 215; *Byerlee* v. *Mendel*, 39 Iowa, 382.

It is in cases only of an entire contract that full performance is held to be a condition precedent to payment, and in which no recovery can be had for partial performance. *Larkin* v. *Buck*, 11 Ohio St. 561; *Davis* v. *Maxwell*, 12 Metc. 286. And where, by the contract of hiring, provision is made for weekly, monthly, or quarterly payments of wages, a failure to pay accordingly furnishes the servant a sufficient excuse to quit the service, and he may recover to the extent of the

wages then earned. *Canal Company* v. *Gordon*, 6 Wall. 561; *Davis* v. *Preston*, 6 Ala. 83; *White* v. *Atkins*, 8 Cush. 367. Nor is his right to monthly payments waived by a neglect to demand payment until the lapse of several months. Id.

§ 16. **Master's refusal to employ.** Where a contract for future employment and service has been entered into, and upon the arrival of the time specified for the commencement of the service, the employee being ready and willing to perform, the employer absolutely repudiates the contract, this is equivalent to a refusal to allow the employee to enter upon the service, and is a breach of the contract. *Howard* v. *Daly*, 61 N. Y. (16 Sick.) 362; S. C., 19 Am. Rep. 285. The remedy of the employee in such a case is not an action for wages, but to recever damages for the breach. Id.; *Elderton* v. *Emmens*, 4 C. B. 479; *Wood* v. *Mayes*, 1 W. R. 166; *Massey* v. *Taylor*, 5 Coldw. (Tenn.) 447; *Willoughby* v. *Thomas*, 24 Gratt. (Va.) 521; *Hochster* v. *De La Tour*, 2 El. & Bl. 678. And *prima facie*, the measure of recovery is the contract price for the full term. Id. And see *Walworth* v. *Pool* 9 Ark. 394; *Miller* v. *Goddard*, 34 Me. 102; *Britt* v. *Hays*, 21 Ga. 157; *Emmens* v. *Elderton*, 4 H. L. Cas. 624. Thus, if the employee has been unable, by the exercise of reasonable diligence, to obtain other employment, the measure of recovery is the wages he would have received if he had been permitted to perform under the contract. *Howard* v. *Daly*, 61 N. Y. (16 Sick.) 362; S. C., 19 Am. Rep. 285; *Nations* v. *Cudd*, 22 Tex. 550; *Jones* v. *Graham*, 21 Ala. 654; *Clancey* v. *Roberson*, 2 Mill. (S. C.) 404. After a refusal to employ agreeably to contract, or after a wrongful dismissal, it is not necessary for the employee to tender his services or to keep himself in readiness to perform. His only further duty is to use reasonable care and diligence in entering into other employment of the same kind, and thus reduce the damages. *Emmens* v. *Elderton*, 13 Com. B. 495; *Polk* v. *Daly*, 14 Abb. (N. S.) 156; S. C., 4 Daly, 411; *Utter* v. *Chapman*, 38 Cal. 659; *Sherman* v. *Champlain Transportation Co.*, 31 Vt. 162; *Thompson* v. *Catholic Congregation Society*, 5 Pick. 469. If the injured party, through negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls on him. *Gillis* v. *Space*, 63 Barb. 177; *Huntington* v. *Ogdensburgh, etc., R. R. Co.*, 33 How. (N. Y.) 416. But he is only required to seek such employment as is within his special line, and as is equally reputable as that for which he was originally engaged. He is not obliged to accept a situation of a more menial character, though offered to him by his former employer. *Ross* v. *Pender*, 1 S. (Sc.) 352. See, also, *Polk* v. *Daly*, 14 Abb. (N. S.) 156; S. C., 4 Daly, 411. If the action is

brought *at once* upon dismissal, or refusal to employ, it is for the jury to determine, in view of all the circumstances of the case, what sum given as damages will make the injured party whole, such sum not to exceed, however, the amount of unearned wages. See *Hochster* v. *De La Tour*, 2 El. & Bl. 678; *Dillon* v. *Anderson*, 43 N. Y. (4 Hand) 231; *Becar* v. *Flues*, 64 N. Y. (19 Sick.) 518; *Smith* v. *Thompson*, 8 Com. B. 44. If the contract of hiring provides for the termination of the service, by notice of a week, month or other stated period, and the person hired is discharged without such notice, the measure of recovery will be the amount of wages for such period. *Hartley* v. *Harman*, 11 Ad. & El. 798.

As it regards the burden of proof, it seems that it is not necessary for the plaintiff to show affirmatively, that an employment was sought for by him and could not be obtained. But it is incumbent upon the defendant to show, in mitigation of damages, that the plaintiff found employment elsewhere, or that other similar employment was offered and declined, or, at least, that it might have been found with reasonable diligence. *Howard* v. *Daly*, 61 N. Y. (16 Sick.) 362; S. C., 19 Am. Rep. 285; *Barker* v. *Knickerbocker Ice Co.*, 24 Wis. 630; *Chamberlin* v. *Morgan*, 68 Penn. St. 168.

It was formerly held, that a person wrongfully discharged, or wrongfully prevented from performing a contract of service, might hold himself in readiness to perform his contract, and, being able, ready and willing to do so, was entitled to recover his wages for the whole term, upon the ground of "constructive service." *Gandell* v. *Pontigny*, 4 Camp. 375; *Aspdin* v. *Austin*, 5 Q. B. 671. And it has been held in some of the American cases, that where the wages are payable at stated periods, an action might be brought for each installment of wages, as they become due. *Thompson* v. *Wood*, 1 Hilt. (N. Y.) 96; *Fowler* v. *Armour*, 24 Ala. 194. And see *Booge* v. *Pacific Railroad*, 33 Mo. 212; *Armfield* v. *Nash*, 31 Miss. 361; *Gordon* v. *Brewster*, 7 Wis. 355. These decisions are based upon the doctrine of "constructive service;" but this doctrine has been repudiated in England and in this country, and decisions founded thereon are not regarded as authoritative. *Smith* v. *Hayward*, 7 Ad. & El. 544; *Fewings* v. *Tisdal*, 1 Exch. 298; *Howard* v. *Daly*, 61 N. Y. (16 Sick.) 362, 373; S. C., 19 Am. Rep. 285. The true remedy of the injured party in such cases is, as already stated, an action for damages for the breach of the contract. Id.; *East Anglian Railway Co.* v. *Lythgoe*, 20 L. J. C. P. 87; *Cameron* v. *Fletcher*, 10 S. (Sc.) 301; *Hartland* v. *General Exchange Bank*, 14 L. T. (N. S.) 863; *Bromley* v. *School District*, 47 Vt.

381; *Pettit* v. *Turner*, 2 N. Y. Sup. (T. & C.) 608; *Noble* v. *Ames Manf. Co.*, 112 Mass. 497; *Morey* v. *King*, 49 Vt. 304.

§ 17. **Compensation to servant.** Where a person is hired for a compensation fixed by agreement of the parties for a specified time, and he continues to serve in the same capacity after the expiration of the term, the law will presume, in the absence of other proof, that he is to receive compensation at the same rate. *Grover & Baker Sewing Machine Co.* v. *Bulkley*, 48 Ill. 189; *Vail* v. *Jersey Little Falls Manuf. Co.*, 32 Barb. 564. See *Smith* v. *Velie*, 60 N. Y. (15 Sick.) 106.

If the contract fixes no time for the completion of the work or when the labor is to be paid for, the inference of the law is, that it is to be paid for when the work is completed; and an action for labor and services cannot be sustained until the work is completed, or the contract is in some way terminated. *Thompson* v. *Phelan*, 22 N. H. 339; *Larkin* v. *Buck*, 11 Ohio St. 561. And see *Beach* v. *Mullin*, 34 N. J. Law, 343; *Andrews* v. *Portland*, 35 Me. 475; *Dover* v. *Plemmons*, 10 Ired. (N. C.) 23; *Olmstead* v. *Beale*, 19 Pick. 528.

If work is to be paid for in a gross sum, but by installments as the work progresses, there can be no recovery of the gross amount until *full* performance, nor of an installment until a *ratable* performance of the contract can be shown. *Cunningham* v. *Morrell*, 10 Johns. 203.

In the case of a hiring for a year, or any other definite period, at a specified sum per month, it is not competent for the employer, within the period contracted for, to reduce the amount of monthly pay, without the consent of the other party. And the fact that the latter remained in the employer's service after notice that a reduction would be made, is not evidence from which such consent can be implied. *Hackman* v. *Flory*, 16 Penn. St. 196.

Where one enters into the employ of another, under an agreement to be compensated in a particular manner, or in certain specific property, as land or goods, and the employer fails to compensate him as was agreed upon, an action for the value of the services in money may be maintained. *Stone* v. *Stone*, 43 Vt. 180. But where there is a valid express contract to pay in a particular manner, no implied contract can be raised to pay in any other manner. Thus, the plaintiff agreed to do certain flagging in front of eight houses and wait for payment "until B sells some of the houses for cash, and then when sold I want my bill of flagging paid." It appeared upon the trial, that the defendant had sold two of the houses for soap, another for jewelry, and still owned the others, and it was held, that as none of the houses had yet been sold *for cash*, the plaintiff could not recover. *Murray* v.

Baker, 6 Hun (N. Y.), 264. And see *Lorillard* v. *Silver*, 36 N. Y. (9 Tiff.) 578; *Smith* v. *Bowler*, 1 Disney (Ohio), 520.

In an action to recover compensation for services rendered, the employer is entitled to show, by way of recoupment of damages, loss sustained by him through the negligence of the employee. *Still* v. *Hall*, 20 Wend. 51; *Stoddard* v. *Treadwell*, 26 Cal. 294; *Wilson* v. *Wall*, 34 Ala. 301. And see *Krom* v. *Levy*, 6 N. Y. Sup. (T. & C.) 253; S. C., 4 Hun, 79. But if the employee or servant is an infant, such damages only as result from the tortious acts of the infant may be recouped. *Meeker* v. *Hurd*, 31 Vt. 639. See *Vehue* v. *Pinkham*, 60 Me. 142. And the employer cannot, in the case of an infant, deduct from his wages for goods furnished him, unless they were necessary. *Hedgley* v. *Holt*, 4 Carr. & P. 104. Nor has a master any right to pay the debts of his servant and charge the same against the servant, unless it is so expressly agreed between them. *Sellen* v. *Norman*, 4 id. 80.

§ 18. **Deduction from wages.** A person who employs another for a definite term is bound to provide him with labor for the full term, and if he neglects or refuses to do so, he is nevertheless liable for the wages he agreed to pay, and no deduction can be made therefrom for time that the servant was not at work. *Cook* v. *Sherwood*, 11 W. R. 595; *Whittle* v. *Frankland*, 2 B. & S. 49. And the same is true where the employer, by a course of persistent persecution, prevents the employee from performing his contract. *Emmens* v. *Elderton*, 18 Jur. 29. And see *Bromley* v. *School District*, 47 Vt. 381. The fact that the business of the employer turns out to be unprofitable will not excuse him for not furnishing employment. He may, if he chooses, abandon the business, but he will be liable for the actual damages sustained by the servant in the loss of employment for the term. *Pilkington* v. *Scott*, 15 Mees. & W. 657; *Cook* v. *Sherwood*, 3 F. & F. 729; S. C., 11 W. R. 595; *Nations* v. *Cudd*, 22 Tex. 550. But it is otherwise, under a contract which provides for the payment of wages in proportion to the work done. In such case there is no implied obligation on the part of the employer to furnish work. *Lees* v. *Whitcomb*, 5 Bing. 34; *Sykes* v. *Dixon*, 9 Ad. & El. 693. Serious illness of the employee releases both parties to the contract of hiring from their obligations, and if the employer has sustained any damage from the failure of the employee to perform, he may deduct it from the wages earned. *Hubbard* v. *Belden*, 27 Vt. 645; *Ryan* v. *Dayton*, 25 Conn. 188; *Green* v. *Gilbert*, 21 Wis. 395. See *ante*, 605, § 15. And this is so, although the sickness is the result of an accident occurring in the discharge of his duties to the employer. *Hunter* v. *Waldron*, 7 Ala. 753; *Wennall* v. *Adney*, 3 B. & P. 246.

One who, by his contract of hiring, agrees that if he intends to leave his employer's service, he will give notice of such intention, and labor ten full working days thereafter, and, in default thereof, forfeit all money that may be due him, may recover from the employer wages previously earned, if he is kept from his work by sickness, gives reasonable notice thereof to the employer, and is absent only so long as he is so disabled. *Harrington* v. *Fall River Iron Works Co.*, 119 Mass. 82. And see *Naylor* v. *Fall River, etc., Co.*, 118 id. 317. See *post*, title *Master and Servant.*

§ 19. **Offer of reward for services.** An offer of a reward by a public advertisement or otherwise, for the finding of lost or stolen property, or for the detection or apprehension of a criminal, or for any other service, is to be regarded as a conditional promise. The advertiser states such terms as he pleases, and whoever would entitle himself to the reward must prove that he has performed *substantially* the service proposed in the advertisement, though it need not be performed literally. *Besse* v. *Dyer*, 9 Allen, 151; *Harson* v. *Pike*, 16 Ind. 140; *Gilmore* v. *Lewis*, 12 Ohio, 281. He must likewise show a rendition of the services required after a knowledge of, and with a view of obtaining the offered reward (*Howland* v. *Lounds*, 51 N. Y. [6 Sick.] 604; S. C., 10 Am. Rep. 654); unless, perhaps, in the case of an offer by the government, where such offers are entered on the public journals. *Auditor* v. *Ballard*, 9 Bush (Ky.), 572; S. C., 15 Am. Rep. 728. And see *Jenkins* v. *Kelren*, 12 Gray, 330; *Dawkins* v. *Sappington*, 26 Ind. 199; *Eagle* v. *Smith*, 4 Houst. (Del.) 293. As to what constitutes a *substantial* performance, depends to a great extent upon the circumstances of each case, in view of the terms of the offer, and the acts done in pursuance of it. *Crawshaw* v. *Roxbury*, 7 Gray, 374. And see *Brennan* v. *Haff*, 1 Hilt. (N. Y.) 151; *Clanton* v. *Young*, 11 Rich. (S. C.) 546; *Gilkey* v. *Bailey*, 2 Harr. (Del.) 359.

In the case of a reward offered for the recovery of stolen or lost property, the person who has acquired a knowledge of the facts necessary to a detection or discovery of the thing stolen or lost, and has imparted such knowledge with the intent and for the purpose of bringing about a recovery or restoration of the property, taking upon himself the risk and consequences of a failure, and acting with a view to the reward, if his suspicions and disclosures are well founded and successful, is the one entitled to the reward. *City Bank* v. *Bangs*, 2 Edw. Ch. (N. Y.) 95; *Janvrin* v. *Exeter*, 48 N. H. 83; 2 Am. Rep. 185. And the person who first gives the information is entitled to the reward, although subsequently, and before the end is attained, other persons give the same information. *Lancaster* v. *Walsh*, 4 M. &

W. 16; *Fallick* v. *Barber*, 1 Maule & Selw. 108. But in a proper case the reward may be apportioned upon equitable principles, as the court may direct. *Rea* v. *Smith*, 2 Handy (Ohio), 193. And if two or more persons communicate the information jointly, they must all join in an action to recover the reward. *Lockhart* v. *Barnard*, 14 Mees. & W. 674.

Where the offer of a reward is made by public proclamation, it may, before rights have accrued under it, be withdrawn through the same channel in which it was made. No contract arises under such offer until its terms are complied with, and the fact that the claimant of such reward was ignorant of its withdrawal is held to be immaterial. *Shuey* v. *United States*, 2 Otto (U. S.), 73. See *Eagle* v. *Smith*, 4 Houst. (Del.) 293.

Where a "liberal reward" was offered for information leading to the apprehension of a fugitive from justice, and a specific sum for his apprehension, it was held that a party giving the information which led to the arrest was entitled to the "liberal reward," but not to the specific sum, unless he, in fact, apprehended the fugitive, or the arrest was made by his agents. *Shuey* v. *United States*, 2 Otto (U. S.), 73.

See further as to offer of reward, *ante*, Vol. 1, pp. 100, 101.

CHAPTER LXXVIII.

HIRE AND CARE OF THINGS.

TITLE I.

GENERAL RULES OF LAW RELATING TO THE HIRE AND CARE OF THINGS.

ARTICLE I.

NATURE OF THE CONTRACT OR BAILMENT.

Section 1. Definition. The hire of a thing is a contract, whereby the use of the thing hired is stipulated to be given for a compensation to bo paid by the hirer. It is a kind of bailment technically known as *locatio rei*, and is in frequent use in the common affairs of life. See Story on Bailm., § 368; 2 Kent's Com. 586; *Coggs* v. *Bernard*, 2 Ld. Raym. 909, 913. A deposit for hire, or the hire of custody, is deemed a hiring of care and attention. Jones on Bailm. 96, 97. In cases of the hiring of a thing, the hirer gains a special property in the thing hired, and the letter to hire an absolute property in the price, while he retains a general property in the chattel as its owner. 2 Kent's Com. 586; *Hopper* v. *Miller*, 76 N. C. 402; *Hickok* v. *Buck*, 22 Vt. 149. The subject-matter of the contract is, at common law, confined to personal or movable property (*Coggs* v. *Bernard*, 2 Ld. Raym. 909); but there would seem to be no difficulty in applying the contract to choses in action and written securities as well as to goods and chattels. See Story on Bailm., § 373. The general principles of the common law, as to the competency of contracting parties, apply to this contract. See *ante*, Vol. 1, 77. And it is likewise essential to the validity of the contract, that it be entered into for a purpose not prohibited by law, or in violation of public policy.

§ 2. **Delivery of the thing hired or bailed.** The delivery of the thing hired is an essential part of the contract, and this delivery must be made to the hirer at his expense, unless it is otherwise agreed between the parties. So, the thing delivered should be accompanied with what is necessary to render it suitable for the use intended; as, if

a horse is let to ride, there should also be let with it a proper saddle and bridle. These things are, however, generally regulated by the customs and business usages of the place where the contract takes effect. See Story on Bailm., § 384.

§ 3. **Price of hire, how determined.** A price is also of the essence of the contract, but a specific price need not be expressly agreed upon, nor is a pecuniary recompense indispensable. No difference, either in responsibility or remedy, exists between cases of a pecuniary payment and cases of any other sort of recompense. Jones on Bailm. 93; Story on Bailm., § 377. If no specific price is agreed on, a reasonable price is to be allowed, which is usually ascertained as the price fixed by custom. Id., § 375. And see *Newhall* v. *Paige*, 10 Gray, 366; *Buford* v. *Tucker*, 44 Ala. 89.

§ 4. **Warranty of title, etc.** The letter to hire impliedly warrants his own title and right of possession to the thing let. So, if he expressly or impliedly represents the thing to be fit for immediate use, or to be applicable to a particular purpose, he impliedly warrants the use for which he receives the hire. Thus, if a man lets furniture for immediate use, there is an implied warranty on his part that it is fit for use, and free from all defects inconsistent with the reasonable and beneficial enjoyment of it. *Sutton* v. *Temple*, 12 Mees. & W. 60. Or, if he lets out a horse equipped for immediate use by an equestrian, he impliedly warrants the equipments to be road-worthy and fit for use, and the horse itself to be well shod, and free from such vices and defects as render it dangerous and unfit to ride. *Blakemore* v. *Bristol, etc., Railway Co.*, 8 Ell. & Bl. 1051. And see *Burges* v. *Wickham*, 3 Best & Sm. 669; *Lyon* v. *Mells*, 5 East, 428, 437; *Hadley* v. *Cross*, 34 Vt. 586. So, if a person hires of a stable-keeper and by mistake takes a horse not intended for him, and the stable-keeper, knowing that he has taken the horse, and the purpose for which he intended to use it, does not make a reasonable effort to notify him of his mistake, he will be liable for any damage caused by the unsuitableness of the horse for the purpose for which it was used. *Horne* v. *Meakin*, 115 Mass. 326. But slight vices and defects only, which merely diminish the appropriateness of the thing for the use intended, are not ordinarily covered by the warranty.

ARTICLE II.

RIGHTS, DUTIES, AND RESPONSIBILITIES OF HIRER, OR OTHER BAILEE.

Section 1. Right to use of thing. The hirer has the exclusive right to the use or enjoyment of the thing hired, during the whole

period of the bailment; and the owner has no right to interfere with its lawful use during this time. *Hickok* v. *Buck*, 22 Vt. 149. Nor can a creditor of the bailor attach and take the thing from the custody of the bailee during the term of the bailment. *Hartford* v. *Jackson*, 11 N. H. 145. And if, during this term, the bailee redelivers the thing to the owner for a special purpose, he may, after that purpose is satisfied, and during his temporary right, maintain an action for its recovery against the owner. *Roberts* v. *Wyatt*, 2 Taunt. 268. But the hirer must not exceed the proper use or enjoyment of the thing, either in time, or mode, or extent. *Mayor of Columbus* v. *Howard*, 6 Ga. 213. And if he misuse or injure it, the owner may determine the contract by peaceably retaking the thing (Story on Bailm., § 396; *Trotter* v. *McCall*, 26 Miss. 413); or, if he cannot peaceably retake it, he may bring an action of *trover* against the hirer therefor. *Wilkinson* v. *King*, 2 Camp. 335; *McLauchlin* v. *Lomas*, 3 Strobh. (S. C.) 85; *Rotch* v. *Hawes*, 12 Pick. 135; *Setzar* v. *Butler*, 5 Ired. (N. C.) L. 212; *Wentworth* v. *McDuffie*, 48 N. H. 402. But he cannot justify a seizure of the thing by force from the personal possession of the hirer. *Lee* v. *Atkinson*, Yelv. 172; S. C., 1 Brownl. & G. 217.

§ 2. **Degree of diligence required.** The contract of hire being one of mutual benefit, the hirer is bound only for ordinary diligence. *Reeves* v. *The Constitution*, Gilp. 579, 585; *Handford* v. *Palmer*, 2 Brod. & B. 359; *Smith* v. *Simms*, 51 How. (N. Y.) 305. It is sufficient, if the hirer use as much care and diligence for the safety of the property, as is usual with the common run of men, or with men of ordinary discretion in managing their own property. Id.; *Rowland* v. *Jones*, 73 N. C. 52; *Angus* v. *Dickerson*, 1 Meigs (Tenn.), 459; *Jackson* v. *Robinson*, 18 B. Monr. (Ky.) 1; *Millon* v. *Salisbury*, 13 Johns. 211; *Maynard* v. *Buck*, 100 Mass. 40. It should, however, be borne in mind, that if the thing is used in a different manner, or for a different purpose, or for a longer time, than was agreed on by the parties, the hirer is answerable for all damages, and even for a loss which due care could not have avoided. *Schenck* v. *Strong*, 4 N. J. Law, 87; *Homer* v. *Thwing*, 3 Pick. 492; *Lewis* v. *McAfee*, 32 Ga. 465; *Perham* v. *Coney*, 117 Mass. 102.

That an ordinary bailee for hire may contract for exemption from liability for want of ordinary care and skill, see *Alexander* v. *Greene*, 3 Hill (N. Y.), 9.

§ 3. **Care of animals hired or bailed.** In accordance with the rule stated in the preceding section, it is held that the hirer of a horse is only bound to exercise the care and discretion, in its use, which a man of ordinary prudence and discretion would exercise in the use of

his own property. He is not, therefore, liable for injuries arising from sickness not caused or contributed to by his abuse or negligence. *Buis* v. *Cook*, 60 Mo. 391. But in the absence of an agreement to the contrary, the hirer of animals is bound to provide them with suitable food during the time of hiring (*Handford* v. *Palmer*, 2 Brod. & B. 359); and any neglect, in this respect, will render him liable to the owner for the damage sustained thereby. Id.; *Buchanan* v. *Smith*, 10 Hun (N. Y.), 474.

If a hired horse becomes sick, or is exhausted, on a journey, it is the duty of the hirer to abstain from using it, and if he pursues his journey, he is liable for all the injury thereby occasioned. *Thompson* v. *Harlow*, 31 Ga. 348. So, if he prescribes unskillfully for the horse, thus causing his death, when he might reasonably have procured the aid of a farrier, he will be held liable for the damages, although he acted in good faith. *Dean* v. *Keate*, 3 Camp. 4. And the hirer of a horse, who, by improper care, has made him sick, and returned him in this condition to the owner, is liable for his full value, if the owner, by the use of reasonable care and the employment of a suitable veterinary surgeon, who treated him according to his best judgment, was unable to cure him. *Eastman* v. *Sanborn*, 3 Allen, 594. And this, although such treatment was, in fact, improper, and contributed to the horse's death. Id. But if a horse falls sick on a journey, without the hirer's fault, and the latter promptly procures the aid of a farrier, he is not responsible for any mistakes of the farrier in the treatment of the horse. *Dean* v. *Keate*, 3 Camp. 4.

Where a horse is hired by one person, and delivered upon his credit to another by the owner, and driven to death by the second, with the co-operation of the first, who is driving another horse in company with him, they may be held jointly liable by the owner. *Banfield* v. *Whipple*, 10 Allen, 27. So, if two or more persons jointly hire a carriage, horses, and driver, and it is a part of the agreement that the horses should be driven by the driver alone, and one of the persons contracting, causes an injury to the horses and carriage, either of the hirers is liable for the damage. *O'Brien* v. *Bound*, 2 Spears (S. C.), 495. But if horses are hired for a journey, and the owner sends his driver, the hirer is not liable if the horses are driven immoderately and injured by the driver. *Hughes* v. *Boyer*, 9 Watts (Penn.), 556. See, also, *Quarman* v. *Burnett*, 6 Mees. & W. 499.

One who hires a horse to ride is authorized to put on the horse, in addition to his own weight, such reasonable baggage as is usual for men to carry on horseback. *McNiell* v. *Brooks*, 1 Yerg. (Tenn.) 75. And where the parties are silent as to the number of persons who are

to be permitted to ride in a hired carriage, the hirer is authorized to carry such number as the vehicle was made for, not exceeding the ordinary load adapted to the team drawing the same. *Harrington* v. *Snyder*, 3 Barb. 380.

Where the plaintiff, having a horse for which he had no use, in order to avoid the expense of keeping, requested the defendant to take it and do his work with it in consideration of its feed and keeping, — it was held, that this was not a mere gratuitous loan, but a contract for the mutual benefit of both parties, under which the defendant was required to exercise only ordinary care in the keeping and care of the animal. *Chamberlin* v. *Cobb*, 32 Iowa, 161

Hirers of slaves were generally bound to furnish them with suitable medical attendance during the term of hiring. *Haywood* v. *Long*, 5 Ired. (N. C.) 438; *Brooks* v. *Cook*, 20 Ga. 87.

§ 4. **Care of animals agisted.** Agistors of cattle are also bound to ordinary diligence. The bailment is for the mutual advantage of both parties; and the agistor is bound to bring to the performance of the contract the exercise of ordinary care, or that degree of care which a man of ordinary prudence would use in the performance of the same duty toward his own property. *McCarthy* v. *Wolfe*, 40 Mo. 520; *Mansfield* v. *Cole*, 61 Ill. 191; *Smith* v. *Cook*, L. R., 1 Q. B. Div. 79; 15 Eng. R. 194. And if he or his servants permit cattle to escape through an insufficient fence, part of which it was his duty to maintain, and the cattle are thereby lost or injured, he will be responsible for the damages sustained by the owner. *Sargent* v. *Slack*, 47 Vt. 674; S. C., 19 Am. Rep. 136; *Halty* v. *Markel*, 44 Ill. 225; *Broadwater* v. *Blot*, Holt. 547.

Agistors have, by virtue of their custody, such a possession and title as enable them to maintain an action against a wrong-doer for any injury to their possession, or for any conversion of the property. *Bass* v. *Pierce*, 16 Barb. 595; *Peoria, etc., R. R. Co.* v. *McIntire*, 39 Ill. 298; *Sutton* v. *Buck*, 2 Taunt. 309; *Burton* v. *Hughes*, 2 Bing. 173; Story on Bailm., § 443. But, at common law, an agistor of cattle has no lien on them for their keeping, except by special agreement with the owner. *Goodrich* v. *Willard*, 7 Gray, 183; *McCoy* v. *Hock*, 37 Iowa, 436; *Allen* v. *Ham*, 63 Me. 532; *Fox* v. *McGregor*, 11 Barb. 41.

§ 5. **Responsibility for negligence.** As the hirer of a thing is bound only for the exercise of ordinary diligence, so he is responsible only for such injuries as are shown to arise from an omission of that diligence. In other words, he is held liable for ordinary negligence. *Sullivan* v. *Scripture*, 3 Allen, 564; *Vaughan* v. *Webster*, 5 Harr. (Del.) 256; *Mayor of Columbus* v. *Howard*, 6 Ga. 213. One who

hires a horse is bound to ride or drive it moderately, and to treat it as carefully as any man of common discretion would his own, and to supply it with proper food. And if he does so, and the horse in such reasonable use is lamed or injured, he is not responsible for any damages. *Millon* v. *Salisbury*, 13 Johns. 211; *Edwards* v. *Carr*, 13 Gray, 234. The hirer is in no sense an insurer of the thing hired. Id. There is, however, on his part, an implied obligation not only to use the thing with due care and moderation, but also not to apply it to any other use than that for which it was hired. See *ante*, 614, §§ 1 and 2. Thus, if a horse is hired as a saddle horse, the hirer has no right to use it in a cart, or to carry loads, or as a beast of burden. So, if horses are hired for a week, the hirer has no right to use them for a month. And, in general, if the thing is used for a different purpose from that which was intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible for all damages, but if a loss afterward occurs, although by inevitable casualty, he will generally be responsible therefor. *Harrington* v. *Synder*, 3 Barb. 380; *ante*, 615, § 2. Such misuser of the thing is deemed, at common law, a conversion of the property, for which the hirer is held responsible to the owner, to the full extent of the loss. *Rotch* v. *Hawes*, 12 Pick. 136; *Fisher* v. *Kyle*, 27 Mich. 454; *Frost* v. *Plumb*, 40 Conn. 111; 16 Am. Rep. 13; *Disbrow* v. *Tenbroeck*, 4 E. D. Smith (N. Y.), 397; *Beach* v. *Raritan, etc., Railroad Co.*, 37 N. Y. (10 Tiff.) 457. See *Harvey* v. *Epes*, 12 Gratt. (Va.) 176. Where one takes the horse of another to board for hire, with instructions not to use him, and the bailee does use him and the horse is thereby injured, it is a conversion of the property, for which an action will lie. *Collins* v. *Bennett*, 46 N. Y. (1 Sick.) 490.

The plaintiff hired a yoke of oxen to the defendant to plow up a hedge. The defendant used them not only for this purpose, but also to draw stone and to load large stone upon a stone-boat. It was held, that drawing stone and rolling them on a boat were not the uses for which the oxen were loaned, and that the defendant was liable for any injuries to the cattle occasioned thereby. *Buchanan* v. *Smith*, 10 Hun (N. Y.), 474.

Where the plaintiffs hired out their barge to be used only as a receiving barge, and it was used by the defendants as a transporting barge and thereby sunk, the defendants were held liable for its value, independently of any question of negligence in their manner of using it. *Beach* v. *Raritan, etc., R. R. Co.*, 37 N. Y. (10 Tiff.) 457.

One who undertakes for hire, to present a draft for acceptance and collection, and fails to give notice of its dishonor, is liable in damages

for the injury sustained by such neglect. 41 How. (N. Y.) 97; S. C., 10 Abb. (N. S.) 209; 3 Daly, 365.

A bailee for hire cannot excuse himself for the want of reasonable care in the management and custody of property intrusted to him, simply by showing that the owner knew and acquiesced in the kind and degree of care which he exercised. *Conway Bank* v. *American Express Co.*, 8 Allen, 512. So, the hirer of a horse at a livery stable is liable for a want of reasonable care and skill in driving him. And, unless he is manifestly incapable of using such care and skill, it is immaterial whether the keeper of the stable expected or had reason to expect that he would or would not be careless or unskillful. *Mooers* v. *Larry*, 15 Gray, 451.

§ 6. **Responsibility for acts of servants.** The hirer of a thing is not only liable for his own personal default, but also for that of his servants and persons employed by him. *Coggs* v. *Bernard*, 2 Ld. Raym. 909; *Milligan* v. *Wedge*, 12 Ad. & El. 737; *Quarman* v. *Burnett*, 6 Mees. & W. 499. And if the servant of a bailee for hire takes and uses the goods bailed, in the business in which he is employed by the bailee, and a loss results by the carelessness of the servant, the master is liable for it, though no express assent by him is shown (*Sinclair* v. *Pearson*, 7 N. H. 219); and although the servant's acts are in disobedience of the master's orders. *Philadelphia, etc., Railroad Co.* v. *Derby*, 14 How. (U. S.) 468; *Sleath* v. *Wilson*, 9 Carr. & P. 607. But the master is not liable for injuries done by one who is his servant, disconnected from and independent of his employment in his master's service (id.; *Herlihy* v. *Smith*, 116 Mass. 265); nor for willful or malicious injury done by his servant, without his knowledge or consent. *M'Manus* v. *Crickett*, 1 East, 106; *Croft* v. *Alison*, 4 Barn. & Ald. 590. See Vol. 1, 287, 288

Where the hirer of a horse stopped at an inn, and ordered the horse to be put into the barn, and fed, and owing to the neglect of the hostler to put the bits in the horse's mouth, on bringing him up, the horse was unmanageable, and ran away, damaging himself, the buggy and harness, it was held, that the hirer of the horse was liable to the owner, for the damage occasioned by the negligence of the hostler. *Hall* v. *Warner*, 60 Barb. 198. As between the letter and the hirer of the horse, the hostler, or person who acted as such at the inn, was the servant of the hirer. Id. See *Chase* v. *Boody*, 55 N. H. 574.

§ 7. **Not responsible for losses by robbery or accident.** In cases of robbery, the hirer is not answerable for the loss, unless it has been occasioned by his own fault. *Coggs* v. *Bernard*, 2 Ld. Raym. 909. Nor is he liable for thefts committed by his servants, unless there are

some circumstances which impute to him a want of due diligence. *Finucane* v. *Small*, 1 Esp. 315; *Clarke* v. *Earnshaw*, 1 Gow. 30; *Butt* v. *Great Western Railway Co.*, 7 Eng. L. & Eq. 448; S. C., 11 C. B. 140.

So, if the thing hired is lost or injured by inevitable casualty, or by an irresistible force, and without the fault of the hirer, he will not be responsible (*Ames* v. *Belden*, 17 Barb. 513; *Reeves* v. *The Constitution*, Gilp. 579); as where a barge was destroyed by ice on the Mississippi river (*M'Evers* v. *Steamboat Sangamon*, 22 Mo. 187); or household furniture in a hotel was destroyed by fire (*Hyland* v. *Paul*, 33 Barb. 241); and this, notwithstanding a provision in the agreement that the hirer should restore the furniture in good condition at the end of the term. Id. And see *Field* v. *Brackett*, 56 Me. 121.

§ 8. **Burden of proof as to negligence.** As a general rule, in cases founded on negligence, the burden of proof is on the plaintiff to show negligence. *Robinson* v. *Fitchburg, etc., Railroad Co.*, 7 Gray, 92; *Welfare* v. *London, etc., Railway Co.*, L. R., 4 Q. B. 693. And this rule has been applied to actions between bailor and bailee for hire. *Cooper* v. *Barton*, 3 Camp. 5, *note*; *Runyan* v. *Caldwell*, 7 Humph. (Tenn.) 134; *Browne* v. *Johnson*, 29 Tex. 40. Thus, in an action on the case against the hirer of a horse, for so negligently taking care of the horse that he became of no value, the burden of proof was held to be on the plaintiff, and that it was not enough for him to show that the horse became disabled, but he must show that he became so by the fault of the defendant. *Harrington* v. *Snyder*, 3 Barb. 380. See, also, *Cross* v. *Brown*, 41 N. H. 283; *Lamb* v. *Western Railroad*, Allen, 98.

On the other hand, where the bailee returned the horse in a damaged condition, and gave no explanation how the injury happened, the burden of proof was held to be upon him, to show that there was no negligence. *Logan* v. *Mathews*, 6 Penn. St. 417. See, also, *Newton* v. *Pope*, 1 Cow. 109; *Cumins* v. *Wood*, 44 Ill. 416; *Brown* v. *Waterman*, 10 Cush. 117; *McDaniels* v. *Robinson*, 26 Vt. 316; *Fox* v. *Pruden*, 3 Daly (N. Y.), 187. And in a recent case it is held, that where property in the exclusive possession of a bailee for hire is injured in a way that does not ordinarily occur without negligence, the burden of proof is upon the bailee, to show that the injury was not occasioned by his negligence. *Collins* v. *Bennett*, 46 N. Y. (1 Sick.) 490.

§ 9. **Payment of price of hire or bailment.** See *ante*, 614, art. 1, § 3. There is an implied obligation on the part of the hirer to pay the stipulated hire or recompense to the letter. But if, without the default of the hirer, there has been no use or enjoyment of the thing hired, whether resulting from accident or the default of the letter, no hire

will, by the common law, become due. See Story on Bailm., § 417 *a*; *Appleby* v. *Dods*, 8 East, 300. And it is held, that, if a horse hired to perform a journey, becomes disabled by lameness, without any fault of the hirer, and he sustains damages thereby, he may recoup his damages, in an action against him for the hire of the horse. *Harrington* v. *Snyder*, 3 Barb. 380. So, if the horse is taken sick on the journey, without the fault of the hirer, the expenses *bona fide* incurred for medicine, nourishment and care during his sickness, must be borne by the bailor, whether the horse recovers or dies of the malady. Id.

But the bailee for hire may be chargeable both with the hire of the thing bailed and its value, if lost through his negligence. *Bigbee* v. *Coombs*, 64 Mo. 529. And the bailor is entitled to recover for the expense, trouble and attention which he is obliged to bestow in restoring a horse let to hire, and made sick by the misconduct or neglect of the hirer. *Graves* v. *Moses*, 13 Minn. 335. But in an action upon a contract of hiring, to recover damages for its breach, a person who is not a party to the contract is not responsible for the injury done to the thing hired, even though such injury is caused by his own carelessness or negligence. Id.

§ 10. **Rights, duties and responsibilities of wharfingers.** Wharfingers, like other depositaries for hire, are responsible only for ordinary diligence. *Foote* v. *Storrs*, 2 Barb. 326. And it is held that the burden of proof to show negligence lies on the plaintiff. Id.; *Marsh* v. *Horne*, 5 Barn. & C. 322, 327. And see *McCarthy* v. *Wolf*, 40 Mo. 520; *Clark* v. *Spence*, 10 Watts, 335. But see *Platt* v. *Hibbard*, 7 Cow. 497; *Mackenzie* v. *Cox*, 9 Carr. & P. 632. That a wharfinger has a lien on the goods for his warfage, see *Ex parte Lewis*, 2 Gall. 483; *Johnson* v. *Schooner Macdonough*, Gilp. 101; *Leuckhart* v. *Cooper*, 3 Bing. N. C. 99; *Rex* v. *Humphrey*, 1 McLel. & Y. 194.

To charge a wharfinger, the goods must be proved to have been booked, or to have been delivered to the wharfinger himself, or to some person who can be proved to have been his agent for the purpose of receiving them. *Buckman* v. *Levi*, 3 Camp. 414. And see *Gibson* v. *Inglis*, 4 id. 72. And where goods are in the wharfinger's possession for shipment, as soon as he delivers them to the proper officers of the vessel, his responsibility is at an end, and he is not liable, though the goods are lost from the wharf before they are shipped. *Cobban* v. *Downe*, 5 Esp. 41. See *ante*, Vol. 2, p. 20.

A wharfinger who has illegally detained goods, which the owner has since agreed to accept and sent for, is not liable for their destruction by fire without his fault, after the owner has had a reasonable time to remove them. *Carnes* v. *Nichols*, 10 Gray, 369.

§ 11. **Rights and responsibility of warehousemen.** The liability of warehousemen rests upon contract implied in law. And they are bound, like all bailees who receive a benefit from the bailment of goods, to exercise ordinary care and diligence, and are responsible only for ordinary neglect. *Titsworth* v. *Winnegar*, 51 Barb. 148; *Neal* v. *Wilmington Railroad*, 8 Jones (N. C.), 482; *Moulton* v. *Phillips*, 10 R. I. 218; S. C., 14 Am. Rep. 663. If goods are injured or destroyed by rats, while in the custody of a warehouseman, he is not liable, provided he has exercised ordinary care in the preservation of the goods. *Cailiff* v. *Danvers*, Peake, 114. So, if the goods were feloniously taken by a stranger, or by a servant of the warehouseman, yet the warehouseman not being negligent, such taking would not create a liability in him. *Fairfax* v. *New York Central, etc., Railroad Co.*, 8 Jones & Sp. (N. Y.) 128. See *Chenowith* v. *Dickinson*, 8 B. Monr. (Ky.) 156; *Hatchett* v. *Gibson*, 13 Ala. 587. He is not only liable for losses by negligence; but, if the property deposited with him is delivered to some person other than the owner, by the *innocent mistake* of himself or his servants, he will be held liable for the loss. *Lubbock* v. *Inglis*, 1 Stark. 104; *Willard* v. *Bridge*, 4 Barb. 361. This is, however, to be understood as having reference to a delivery to a wrong person when the warehouseman knows, or has the means of knowing, the real owner. *Parker* v. *Lombard*, 100 Mass. 405.

It is held that the liability of the warehouseman commences as soon as the goods arrive, and the crane of the warehouse is applied to raise them into the warehouse. *Thomas* v. *Day*, 4 Esp. 262; *Merritt* v. *Old Colony, etc., Railway Co.*, 11 Allen, 80, 83. See *Shepherd* v. *Bristol, etc., Railway Co.*, L. R., 3 Exch. 189; *Smith* v. *Nashua, etc., Railroad Co.*, 7 Fost. (N. H.) 91. And he is liable for negligent injury to the goods while in his possession, although it appears that after the happening of the injury, the goods were destroyed without his fault, and that they must have been so destroyed even if no damage had previously occurred. *Powers* v. *Mitchell*, 3 Hill, 545. So, if through the negligence of the servant of the warehouseman, the goods are not delivered to the consignee when called for by him, and they are destroyed by an accidental fire, the warehouseman will beheld responsible for their loss. *Stevens* v. *Boston and Maine Railroad*, 1 Gray, 277.

As to the burden of proof it is held, that the non-delivery of the property is sufficient to raise a presumption of negligence, and the burden is then thrown upon the warehouseman, to show that sufficient ordinary care had been bestowed on the property. If that is

shown, the warehouseman is relieved from liability. *Coleman* v. *Livingston*, 4 Jones & Sp. 32; S. C. affirmed, 56 N. Y. (11 Sick.) 658; *Fairfax* v. *N. Y. Cent. R. R. Co.*, 8 Jones & Sp. 128; *Schwerin* v. *McKie*, 51 N. Y. (6 Sick.) 180; S. C., 10 Am. Rep. 581; *Cass* v. *Boston, etc., Railroad Co.*, 14 Allen, 448. But see *ante*, 620, § 8; *Schmidt* v. *Blood*, 9 Wend. 268.

Warehousemen have a specific, not a general lien. *Steinman* v. *Wilkins*, 7 Watts. & Serg. 466. But a warehouseman may deliver a part, and retain the residue for the price chargeable on all the goods received by him under the same bailment, provided the ownership of the whole is in the same person. Id.; *Morgan* v. *Congdon*, 4 N. Y. (4 Comst.) 552. And see *Gerrard* v. *Moody*, 48 Ga. 96, 99.

ARTICLE III.

RESTITUTION OR RE-DELIVERY OF THE THING HIRED OR BAILED.

Section 1. To whom restored. The general rule, in cases of hiring, where there is no stipulation to the contrary, requires the hirer to return the thing hired on the determination of the bailment. *Syeds* v. *Hay*, 4 Term R. 264; *Benje* v. *Creagh*, 21 Ala. 151, 155. And it results from the very obligation of his contract, that if the hirer fails to restore the thing to the *rightful owner*, but negligently or wrongfully delivers it to another person, not entitled to receive it, he is guilty of a conversion. *Stephenson* v. *Hart*, 4 Bing. 476; *Devereux* v. *Barclay*, 2 Barn. & Ald. 702; *Coykendall* v. *Eaton*, 55 Barb. 188; S. C., 37 How. 438; *Claflin* v. *Boston, etc., Railroad Co.*, 7 Allen, 341. See *Parker* v. *Lombard*, 100 Mass. 405.

§ 2. **Condition of thing restored.** So, the hirer is bound to restore the thing in as good condition as he received it, unless it has been injured in some way wholly without his default. As to all accidents naturally incident to the use of the thing, in the manner contracted for, the law imposes the risk on the bailor. *Millon* v. *Salisbury*, 13 Johns. 211. If it has been injured by the hirer's neglect, he is liable for the damages, although the owner has received it back. The restoration of the property goes only in mitigation of damages. *Reynolds* v. *Shuler*, 5 Cow. 323. And see *Austin* v. *Miller*, 74 No. Car. 274. But if the hirer, instead of restoring the thing, pays its full value to the owner, on account of the injury sustained by his own negligence, he becomes thenceforth the proprietor of the thing, and the latter has no longer any title to it. Story on Bailm., § 414. See *ante*, Vol. 2, p. 525.

§ 3. **When and where returned.** The time and place where the thing is to be restored are governed by the circumstances of the individual case, and depend upon the same general rules that are applied in other cases of bailment. See *ante*, Vol. 2, title *Deposit.* If the time for restitution be not fixed by agreement, or by the nature of the object to be accomplished, the bailee must return the property whenever called upon, after a reasonable time; and what is a reasonable time must be determined by the circumstances of each particular case. *Cobb* v. *Wallace*, 5 Coldw. (Tenn.) 539.

Where a chattel is hired for a limited period at a definite price, but, by an oversight, is detained for a much longer period, the hirer is only liable for the value of the use for the entire period of the detention, and not at the rate per day, or other period, of the original hiring. *Russell* v. *Roberts*, 3 E. D. Smith (N. Y.), 318. And see *Greer* v. *Tweed*, 13 Abb. (N. S.) 427.

ARTICLE IV.

DISSOLUTION OF CONTRACT OF HIRE OR CARE OF THINGS.

We have seen (*ante*, 614, art. 1, § 3), that if the hirer misuse or injure the thing hired, the owner has it in his power to terminate the bailment. So, if the hirer does an act which is equivalent to the destruction of the thing, or entirely inconsistent with the terms of the bailment, such act operates to terminate the bailment, and the possessory title reverts to the bailor. *Fenn* v. *Bittleston*, 7 Exch. 152, 159.

In general, if the thing hired perishes by accident, without the default of either party, the contract is dissolved; and while the latter can claim no recompense *pro tanto*, by way of apportionment, neither can the hirer ordinarily insist upon damages for any loss thereby sustained. See Sory on Bailm., § 418 *a; ante*, 620, art. 2, § 9. One who hired a slave for a fixed and definite period was held liable for the entire hire, although the slave was emancipated during the term. *Buford* v. *Tucker*, 44 Ala. 89. If the contract be dissolved by the mutual consent of the parties, the effect of the dissolution upon their rights will, of course, depend upon the stipulations agreed to between them.

ARTICLE V.

MISCELLANEOUS.

Section 1. Loans of money for hire. The loan of money for hire is usually termed a loan at interest. It is a loan for use and con-

sumption, its equivalent in value and kind only being intended to be returned. The absolute property passes to the hirer or borrower and he becomes the debtor of the lender. See *Kellogg* v. *State*, 26 Ohio St. 15, 18. And the liability of the hirer to repay the equivalent amount is not discharged by loss of the money from robbery, fire or inevitable accident. See *ante*, Vol.1, title *Banks and Banking*. See, also, *Perley* v. *County of Muskegon*, 32 Mich. 132; S. C., 20 Am. Rep. 637.

§ 2. **Deposits of money with bankers.** In the case of money deposited in the hands of bankers in the ordinary course of business, upon which interest is to be paid by the banker, the transaction amounts to a letting and hiring of the money or a loan at interest. The money becomes the property of the banker, and he becomes the debtor of the depositor. *Perley* v. *County of Muskegon*, 32 Mich. 132; S. C., 20 Am. Rep. 637. But if no interest is to be paid on the deposit, it is a *commodatum* or gratuitous loan, and the banker is bound only for slight care, and is responsible only for gross negligence. See *ante*, Vol. 1, p. 502. In England, if the money remains for six years in the banker's hands without any payment by him of any part of the principal, or any acknowledgment by him in writing of the existence of the loan and of the debt, the statute of limitations will be a bar to its recovery by action. *Pott* v. *Clegg*, 16 Mees. & W. 321; *Howard* v. *Danbury*, 2 C. B. 806. In this country, an action cannot be maintained for a deposit in a bank, without an actual demand, or something equivalent thereto (See *ante*, Vol. 1, p. 504); and until then, the statute does not begin to run. Id. But see *Buckner* v. *Patterson*, Litt. Sel. Cas. (Ky.) 234; *Union Bank* v. *Knapp*, 3 Pick. 96.

ARTICLE VI.

REMEDIES.

Section 1. In general. Although the owner of a chattel, who has hired it to another, cannot maintain either trespass or trover against a third person, in respect to any injury to or conversion of it, during the time it is so hired (*Steele* v. *Williams*, Dudley [S. C.], 16; *Lexington, etc., Railroad Co.* v. *Kidd*, 7 Dana [Ky.], 245), yet, he has a special action on the case, for the consequential injury to his reversionary interest. Id. Thus, an owner of a barge, which is out on hire for an unexpired term, may maintain an action against a third person for a permanent injury to it. *Mears* v. *London, etc., Railway Co.*, 11 C. B. (N. S.) 850. And see *Howard* v. *Farr*, 18 N. H. 457.

And if the hirer do any act inconsistent with the bailment, and calculated to defeat the rights of property of the owner, the latter may treat the bailment as ended, and maintain *trover*. *Clarke* v. *Poozer*, 2 M'Mull. (S. C.) 434; *ante*, 614, art. 2, § 1. Thus, one who hires a horse for a specified journey, and drives it beyond what his contract contemplated, takes upon himself all the consequences of such additional driving, and if the horse dies while being so driven, he is liable in *trover* for its value. *Fisher* v. *Kyle*, 27 Mich. 454. Such use is an invasion of the owner's rights and inconsistent with the idea of an existing bailment. *Wentworth* v. *McDuffie*, 48 N. H. 402. And the rule is the same, although the contract of hiring was made on the Lord's day, and, as both parties knew, for pleasure or business only, and therefore illegal and void. *Hall* v. *Corcoran*, 107 Mass. 251; S. C., 9 Am. Rep. 30; *Frost* v. *Plumb*, 40 Conn. 111; S. C., 16 Am. Rep. 18. But see *Parker* v. *Latner*, 60 Me. 528; S. C., 11 Am. Rep. 210, wherein it was held that an action on the case was not maintainable for the recovery of damages, arising from the immoderate driving of a horse during a pleasure drive on the Lord's day, for which the horse was hired. See, also, *Whelden* v. *Chappel*, 8 R. I. 230.

In *Cooper* v. *Willomatt*, 1 C. B. 672, it is held that a bailee for hire of goods, who sells them by private sale to a *bona fide* purchaser, thereby determines the bailment, and the bailor may maintain *trover* for their recovery against the purchaser. And see *Quinn* v. *Davis*, 78 Penn. St. 15.

Where property stored for hire is not put into the actual custody of the bailee, but is deposited upon his premises, openly accessible to every person, a mere demand and refusal to deliver may not be sufficient to entitle the owner to recover for a conversion. And where an actual conversion by the bailee is disproved, and no negligence by him is shown, a judgment against him for conversion cannot be sustained. *Feltman* v. *Gulf Brewery*, 42 How. (N. Y.) 488.

An agistor of cattle may maintain trespass or trover against a stranger who wrongfully takes them away. *Bass* v. *Pierce*, 16 Barb. 595; *ante*, Vol. 1, 281; Vol. 2, 528. See *Trespass; Trover.*

CHAPTER LXXIX.

HUSBAND AND WIFE.

TITLE I.

OF MARRIAGE.

ARTICLE II.

OF THE CONTRACT OF MARRIAGE.

Section 1. What marriage is. Marriage is more than a contract; and it differs from all other contracts in this, that it cannot be rescinded at the will of the parties. *Clayton* v. *Wardell*, 4 N. Y. (4 Comst.) 230; S. C., 5 Barb. 214. It is an institution of society founded upon the consent and contract of the parties to the marriage. *Duntze* v. *Levett*, Ferg. 68, 385, 397; *Townsend* v. *Griffin*, 4 Harr. (Del.) 440; *Dickson* v. *Dickson*, 1 Yerg. (Tenn.) 110, 112. And it is not originally and simply either a civil or a religious contract; it partakes of both. *Fornshill* v. *Murray*, 1 Bland, 479. But the law contemplates it only as a civil institution (*Cunningham* v. *Burdell*, 4 Bradf. [N. Y.] 343; *Jenkins* v. *Jenkins*, 2 Dana, 102; *Graham* v. *Bennet*, 2 Cal. 503); and it should be viewed rather as a *status* than as a contract. It is not a contract within the constitutional provision protecting the obligation of contracts, but a civil institution or relation, to be regulated and controlled by law, so far as the rights of the parties thereto in the property of each other is concerned. *Cabell* v. *Cabell*, 1 Metc. (Ky.) 319; *Starr* v. *Hamilton*, Deady, 268; 2 Br. & Had. Com. 345, Wait's ed., *n*.

At common law a contract of marriage made *per verba de presenti* amounts to an actual marriage, and is valid. *Clayton* v. *Wardell*, 4 N. Y. (4 Comst.) 230; *Hutchins* v. *Kimmell*, 31 Mich. 127; 18 Am. Rep. 164); and a contract *per verba de futuro, cum copula*, constitutes a valid marriage. *Turpin* v. *The Public Administrator*, 2 Bradf. (N. Y.) 424. But living together "as man and wife" is not marriage, nor is an agreement so to live a contract of marriage, especially where the facts lead to the inference that the arrangement was temporary. *Letters* v. *Cady*, 10 Cal. 533; *State* v. *Tachanatah*, 64 N. C. 614.

§ 2. **Who may not marry.** A marriage between persons in the direct line of consanguinity, or between brother and sister, is clearly unlawful by the law of the land, independent of any church canon, or of any statute prohibition. It is a prohibition of the natural law, and is of absolute, uniform and universal obligation. It is a rule of the common law founded in the common reason and the acknowledged duty of mankind, sanctioned by immemorial usage; and as such, it is clearly binding. But as to the collateral degrees beyond brother and sister, independent of common law decisions and of any statutory authority the *Levitical* degrees are not binding as a rule of municipal obedience. *Wightman* v. *Wightman*, 4 Johns. Ch. (N. Y.) 343, 348.

The English laws place affinity on the same footing with consanguinity (*Harris* v. *Hicks*, 2 Salk. 548; *Hill* v. *Good*, Vaugh. 304; *Reg.* v. *Chadwick*, 11 Ad. & E. [N.S.] 173, 205; S. C., 12 Jur. 174); and a marriage within the prohibited degrees is null and void although one of the parties is illegitimate. *Regina* v. *Brighton*, 1 Best & S. 447; 9 W. R. 831; 5 L. T. (N. S.) 56. But with regard to marriages among relatives by affinity, the rule in this country is not so stringent as in England. *Sutton* v. *Warren*, 10 Metc. 451; *Harrison* v. *State*, 22 Md. 468. And except there be statutory provisions to the contrary, a man may marry his deceased wife's sister (*Blodget* v. *Brinsmaid*, 9 Vt. 27); or his mother's sister (*Sutton* v. *Warren*, 10 Metc. 451); or his niece. *Bonham* v. *Badgley*, 2 Gilm. (Ill.) 622.

§ 3. **Social condition.** Race, color and social rank do not appear to constitute impediments to marriage at common law, but by local statutes in some of the United States intermarriage has been discouraged between persons of the negro, or indian, and of the white races. *Bailey* v. *Fiske*, 34 Me. 77; *State* v. *Hooper*, 5 Ired. 201; *Barkshire* v. *State*, 7 Ind. 389; *State* v. *Ross*, 76 N. C. 242; *State* v. *Kennedy*, id. 251. With the recent extinction of slavery many of these laws are a dead letter; but marriages between whites and negroes are still prohibited and even made a crime in certain States. *State* v. *Gibson*, 36 Ind. 389; 10 Am. Rep. 42; *State* v. *Hairston*, 63 N. C. 451; *Scott* v. *State*, 39 Ga. 321.

The manifest tendency of the day is toward removing all legal impediments of rank and condition, leaving individual tastes and social manners to impose the only restrictions of this nature. *Stewart* v. *Munchandler*, 2 Bush (Ky.), 278; *State* v. *Harris*, 63 N. C. 1.

How far the intermarriage of different classes and races may be restricted by law, see *Jones* v. *Jones*, 36 Md. 447; 11 Am. Rep. 505; and *Lonas* v. *State*, 3 Heisk. (Tenn.) 287.

§ 4. **Mental capacity.** Idiots and lunatics and all others who have not understanding sufficient to carry on the ordinary business affairs of life, and to enter into other contracts, are incapable of entering into a valid contract of marriage. *Ward* v. *Dulaney*, 23 Miss. 410; *Cole* v. *Cole*, 5 Sneed (Tenn.), 57; *Rawdon* v. *Rawdon*, 28 Ala. 565. But one who can manage his business affairs with ordinary prudence and skill, can enter into a valid marriage although he has a mental delusion on certain subjects, is eccentric in his habits, or is possessed of a morbid temperament. *Browning* v. *Reane*, 2 Phillim. 69; *Atkinson* v. *Medford*, 46 Me. 510.

A marriage contracted by a person habitually sane, during temporary insanity, is unquestionably void. *Legget* v. *O' Brien*, Milward, 325; *Parker* v. *Parker*, 2 Lee, 382. And it would be void if one of the parties was at the time insane from *delirium tremens*. *Clement* v. *Mattison*, 3 Rich. (S. C.) 93. But a marriage contracted by a lunatic during a lucid interval might be valid. *Banker* v. *Banker*, 63 N. Y. (8 Sick.) 409; *Crump* v. *Morgan*, 3 Ired. Ch. 91.

Deaf and dumb persons are capable of contracting marriage, and they may do so by signs. *Dickenson* v. *Blisset*, 1 Dickens, 268; *Harrod* v. *Harrod*, 1 Kay & Johns. 4.

The nullity of the marriage of a lunatic must be ascertained and declared by the decree of a court of competent jurisdiction, to constitute the proper evidence of the invalidity of the attempted marriage. *Wiser* v. *Lockwood*, 42 Vt. 720; *Hamaker* v. *Hamaker*, 18 Ill. 137.

§ 5. **Physical capacity.** The contract of marriage implies that the parties are capable of consummating it. And an impotent person, who, knowing his defect, induces a person not knowing it, to marry him, commits thereby a gross fraud and injury. *Briggs* v. *Morgan*, 3 Phillim. 325.

A person is impotent who has neither the power of copulation nor of procreation. Bishop on Marr. & Div., § 228, 3d ed. Mere sterility can in no case form a sufficient ground for a decree annulling the marriage. But the marriage of one affected with congenital imbecility will be declared void *ab initio*, at the suit of his guardian. *Waymire* v. *Jetmore*, 22 Ohio St. 271.

Whatever the impotence, to be a ground for divorce, it must exist at the time of the marriage (*Bascomb* v. *Bascomb*, 5 Foster [N. H.], 267; *Devenbagh* v. *Devenbagh*, 5 Paige, 554); and the defect must be incurable (*J. H.* v. *H. G.*, 33 Md. 401; 3 Am. Rep. 183; *Ferris* v. *Ferris*, 8 Conn. 166); or it must appear that the impotent party unreasonably refuses to be cured. *Devenbagh* v. *Devenbagh*, 5 Paige, 554. Cases of absolute and incurable impotence are diminishing with the

rapid advance of medical science. *W.* v. *H.*, 2 Swab. & T. 240; *T.* v. *M.*, L. R., 1 P. & D. 31. The statute remedy in many States for cases of this sort is by divorce proceedings. *J. G.* v. *H. G.*, 33 Md. 401.

It seems if a man has not the potency carnally to know his wife, and has "the power and the ability of body to deal with *other women* and know *them* carnally," the wife on her application will be entitled to a divorce because of his impotence *as to her*. *Essex* v. *Essex*, 2 How. St. Tr. 876.

In the absence of any express statutory provision therefor, a marriage will not be annulled for impotence. *Anonymoas*, 24 N. J. Eq. 19. And until sentence of separation between parties to a marriage, one of whom is impotent, the marriage is deemed valid and subsisting. *Smith* v. *Morehead*, 6 Jones' Eq. (N. C.) 360.

§ 6. **Infancy.** The common law, following the Roman law, establishes a certain period called the age of consent, which is fixed at fourteen years in males, and twelve years in females. Most of the older States have adopted the common law rule. Other States have by statute established the age of consent. In Ohio, Indiana and other Western States it is eighteen years for males and fourteen years for females. New York has adopted the common law rule, but the court has by statute power to annul marriages in certain cases when the female was, at the time of the marriage, under the age of fourteen. *Bennett* v. *Smith*, 21 Barb. 439.

It seems that marriage within the age of consent is neither strictly void nor strictly voidable, but rather inchoate and imperfect. *Parton* v. *Hervey*, 1 Gray, 119; *Fitzpatrick* v. *Fitzpatrick*, 6 Nev. 63. It is invalid unless confirmed by cohabitation after reaching the age of consent. *Shafher* v. *State*, 20 Ohio, 1; *contra*, *Goodwin* v. *Thompson*, 2 Iowa, 329.

When the age of consent is reached, no new ceremony is requisite to complete the marriage at common law. Slight acts and especially the continued intercourse of the parties may show their intention to affirm. *Goodwin* v. *Thompson* 2 Iowa, 329; *Koonce* v. *Wallace*, 7 Jones' Law (N. C.), 194. And a marriage between parties within the age of consent may be disaffirmed on arriving at the established age with or without judicial sentence. But if a party without the age of consent intermarry with a person within the age, it is not certain that he may disaffirm equally with the incompetent party. *People* v. *Slack*, 15 Mich. 193.

§ 7. **Prior marriage.** A second marriage by a party who has a consort living is absolutely void. *Appleton* v. *Warner*, 51 Barb. (N. Y.) 270; *Summerlin* v. *Livingston*, 15 La. Ann. 519; *Heffner* v.

Heffner, 23 Penn. St. 104. But in an action between the parties to the marriage it cannot be treated as a mere nullity, even though the one party alleges the facts, which, if true, render it null and void. The nullity must first be established in a proceeding directly for that purpose. *Griffith* v. *Smith*, 1 Penn. L. J. 479.

By statute, where a party to a marriage has been absent from the State of his residence for five successive years, and has not, within that period, been heard from by the other party to the marriage, that other party is competent to enter into a new marriage contract. *Strode* v. *Strode*, 3 Bush (Ky.), 227; *White* v. *Lowe*, 1 Redf. (N. Y.) 376; *Tefft* v. *Tefft*, 35 Ind. 44. Other States have different periods of time. But where a woman, having married, lives with her husband but a short time, and *four* years thereafterward marries another man, and lives with him sixteen years, in the absence of any showing that she had heard from her first husband within the time, the second marriage will be presumed to be lawful. *Kelly* v. *Drew*, 12 Allen (Mass.), 107. See, too, *Canady* v. *George*, 6 Rich. Eq. (S. C.) 103. Where a woman marries without knowledge that the one whom she marries has a wife then living, she may during his life-time and without any proceedings having been had to nullify such marriage, lawfully contract a marriage with another. *Shaak's Estate*, 4 Brewst. (Penn.) 305; S. C., 3 Pittsb. 275; *Reeves* v. *Reeves*, 54 Ill. 332.

A form of marriage entered into in good faith, and in belief of the death of the woman's actual husband, is void although he has been absent for several years without her knowing that he was alive. *Glass* v. *Glass*, 114 Mass. 563. And where, without leave of the court, a guilty party in case of divorce marries again during the life of the other party, and afterward obtains such leave, a continued cohabitation in belief that the marriage already solemnized is or has become legal, does not render it so. *Thompson* v. *Thompson*, 114 Mass. 566.

Where a woman, married in one State and there divorced for acts of hers which would not be a cause of divorce in another State, marries again in that other State, her marriage is valid there, though contracted in the life-time of her former husband. *Clark* v. *Clark*, 8 Cush. 385.

A decree in a divorce case in New York, that a party shall not marry again, can have no *extra*-territorial effect. *Van Storch* v. *Griffin*, 71 Penn. St. 240.

A marriage contracted during the life-time of a former husband or wife is not valid for any other purpose concerning property, than that of preserving the inheritance of the offspring thereof from the competent parent. *Spicer* v. *Spicer*, 16 Abb. (N. Y.) N. S. 112.

By the Spanish law, a husband or wife entering *bona fide* into mar-

riage with one who has another consort living, or where there is any impediment to the marriage, is, in law, not only innocent of crime, but has all the rights, incidents and privileges of lawful marriage; and these continue until such former marriage, or other impediment, becomes known to the party. *Lee* v. *Smith*, 18 Tex. 141.

§ 8. **Force and fraud.** A marriage produced by force or fraud or involving palpable error is void. *Scott* v. *Shufeldt*, 5 Paige (N. Y.), 43; *Keyes* v. *Keyes*, 2 Fost. (N. H.) 553; *Dalrymple* v. *Dalrymple*, 2 Hag. Con. 54, 104; S. C., 4 Eng. Ecc. 485.

The force or coercion necessary to invalidate a marriage must amount to duress *per minas*. Mere unwillingness on the part of one of the parties is not sufficient. *Stevenson* v. *Stevenson*, 7 Phil. (Penn.) 386. And a marriage void *ab initio*, by fraud or force, may be made valid by voluntary cohabitation, after the cause of intimidation has been removed. *Hampstead* v. *Plaistow*, 49 N. H. 84; *Leavitt* v. *Leavitt*, 13 Mich. 452.

False representations of a party as to his character, social standing or fortune do not constitute such fraud on the opposite party as to avoid a marriage induced thereby. *Wier* v. *Still*, 31 Iowa, 107. Concealment of previous unchaste and immoral behavior will not generally vitiate a marriage. *Best* v. *Best*, 1 Add. Ecc. 411; S. C., 2 Eng. Ecc. 158; *Leavitt* v. *Leavitt*, 13 Mich. 452. But where a woman is pregnant by another man, at the time of the nuptials, and soon afterward bears a child to an innocent husband, the marriage may be avoided by him. *Reynolds* v. *Reynolds*, 3 Allen, 605; *Crehore* v. *Crehore*, 97 Mass. 330; *Montgomery* v. *Montgomery*, 3 Barb. Ch. 132. But see *Foss* v. *Foss*, 12 Allen, 26.

A defendant who has, by false representations, procured a marriage between himself and the plaintiff, when by law he was not competent to enter into the marriage contract, is liable to her in damages. *Blossom* v. *Barrett*, 37 N. Y. (10 Tiff.) 434; *Withee* v. *Brooks*, 65 Me. 14.

Where a marriage is effected through the fraudulent conspiracy of a third person, the rule is that unless one of the contracting parties is cognizant of the fraud, the marriage is perfect, but if cognizant, the marriage is to be deemed the fraud of such party. *Rex* v. *Minshull*, 1 Nev. & M. 277; *Montgomery* v. *Montgomery*, 3 Barb. Ch. 132.

§ 9. **Consent.** Consent is necessary to the marriage contract, as well as to any other contract. *Cole* v. *Cole*, 5 Sneed (Tenn.), 57; *Harrod* v. *Harrod*, 1 Kay & J. 4; 18 Jur. 853. An intention in both parties to enter into a contract of marriage must be established. *Jaques* v. *Public Administrator*, 1 Bradf. (N. Y.) 499. Nothing more is

needed to constitute a marriage, than that in language which is mutually understood, or in any words declaratory of intention, the parties accept each other as husband and wife, and if the words do not of their natural meaning, or by common use, "conclude matrimony," yet if the parties intend marriage, and their intent sufficiently appears, they are inseparably husband and wife. Consent may be either verbal or written, and where there is no ceremony, but the parties live together as husband and wife for many years, they are deemed in law married. *Dickerson* v. *Brown*, 49 Miss. 357; *Richard* v. *Brehm*, 73 Penn. St. 140; 13 Am. Rep. 733; *Hutchins* v. *Kimmell*, 31 Mich. 127; 18 Am. Rep. 164; *Caujolle* v. *Ferrie*, 23 N. Y. (9 Smith) 90.

A marriage ceremony performed in jest does not make the parties husband and wife, even though the ceremony was performed by a justice of the peace who was in doubt at the time whether the parties were in jest or earnest. *McClurg* v. *Terry*, 21 N. J. Eq. 225.

Where a minor female is inveigled into a marriage which is never consummated by cohabitation, but is by her immediately after the ceremony repudiated, the marriage should be declared void, the female not having consented thereto. *Lyndon* v. *Lyndon*, 69 Ill. 43; *Robertson* v. *Cole*, 12 Tex. 356.

If a single man lawfully arrested under a proceding in bastardy, on the examination of a single woman chooses to marry her as a means of avoiding the legitimate consequences of the proceedings, he cannot avoid the marriage on the ground that at the time thereof he was under duress by virtue of the arrest (*Sickles* v. *Carson*, 26 N. J. Eq. 440; *Williams* v. *State*, 44 Ala. 24; *Jackson* v. *Winne*, 7 Wend. 47); not so if the warrant on which he was arrested was issued on a false charge. *Collins* v. *Collins*, 2 Brewst. (Penn.) 515; *Soule* v. *Bonney*, 37 Me. 128; *Barton* v. *Morris*, 15 Ohio, 408.

If certain town authorities hire one who is settled in another town to marry a woman in order to impose her support on that town, the person hired never fulfilling or intending to fulfill the obligation of marriage, the marriage will be annulled on the woman's petition. *Barnes* v. *Wyethe*, 28 Vt. (2 Wms.) 41.

§ 10. **License.** Although a person who solemnizes a marriage without license is subject to a penalty, the marriage is not void. *Askew* v. *Dupree*, 30 Ga. 173; *Carmichael* v. *State*, 12 Ohio (N. S.), 553; *State* v. *Robbins*, 6 Ired. 23. See 1 Br. & Had. Com. 346, *n.*, Wait's ed.

When a marriage of a minor is celebrated by a license to which the father's consent is requisite, his consent is presumed until proved to the contrary. *Harrison* v. *Southampton*, 21 Eng. Law & Eq. 343. And a marriage in the District of Columbia, if celebrated by a clergyman

in facie ecclesiae is not invalid for the want of a marriage license. *Blackburn* v. *Crawfords*, 3 Wall. (U. S.) 175.

Non-residence of the female in the county in which the marriage license issues does not invalidate the license or render void the marriage solemnized under it. *Ely* v. *Gammel*, 52 Ala. 584.

§ 11. **Form of ceremony.** No solemnization or other formality, apart from the agreement itself, is necessary to constitute a marriage at common law. 2 Kent's Comm. 87. And it is so held in New York (*Bissell* v. *Bissell*, 55 Barb. 325; S. C., 7 Abb. [N. S.] 16); in Pennsylvania (*Guardians of the Poor* v. *Nathan*, 2 Brewst. 149); in Michigan (*Hutchins* v. *Kimmel*, 31 Mich. 127; 18 Am. Rep. 164); in New Jersey (*Goldbeck* v. *Goldbeck*, 3 Green, 42); in Texas (*Sapp* v. *Newsom*, 27 Texas, 537); in California (*Graham* v. *Bennet*, 2 Cal. 503); in Mississippi (*Dickerson* v. *Brown*, 49 Miss. 357). In Maryland some religious ceremony must be superadded to the marriage contract to constitute a lawful marriage (*Denison* v. *Denison*, 35 Md. 361); so, too, in North Carolina. *State* v. *Samuel*, 2 Dev. & Bat. 177, 181. In California and Oregon the consent of the parties to become husband and wife must be avowed before a person authorized to solemnize marriages, and in the presence of two witnesses. *Holmes* v. *Holmes*, 1 Abb. (U. S.) 525.

Marriages valid at the common law but not solemnized in conformity with the requirements of statutes will be held valid, unless positively declared void by statute. *Hargroves* v. *Thompson*, 31 Miss. (2 George) 211; *Campbell* v. *Gullatt*, 43 Ala. 57.

It is well settled that a marriage lawful where contracted is lawful everywhere; the converse is also well settled, but is applied with more hesitation. *Fenton* v. *Livingstone*, 3 Macq. H. L. Cas. 497; *Harford* v. *Morris*, 2 Hag. Con. 423; *Clark* v. *Clark*, 8 Cush. 385. But if a foreign State should permit a marriage clearly incestuous by the law of nature it would not be valid elsewhere. *Greenwood* v. *Curtis*, 6 Mass. 378. The forms of entering into a contract of marriage are regulated by the *lex loci contractus;* the essentials of the contract depend upon the *lex domicilii.* If the essentials are contrary to the *lex domicilii* there marriage is the void, although it was duly solemnized elsewhere according to the laws of the place where solemnized. *Brooks* v. *Brooks*, 9 H. L. Cas. 193; *State* v. *Ross*, 76 N. C. 242; *State* v. *Kennedy*, id. 251; *ante*, § 2.

Where a marriage is claimed to have been made by a minister, the extent of his authority for that purpose should appear. *The State* v. *Bray*, 13 Ired. 289.

Cohabitation between parties and an acknowledgment that they are

man and wife, and a general reputation that they are such, do not of themselves constitute marriage, but are merely evidence from which the jury may find that the parties were married. *Dunbarton* v. *Franklin*, 19 N. H. 257. And without concomitant facts, an irregular cohabitation and popular reputation are of no avail to prove marriage. *Yardley's Estate*, 75 Penn. St. 207; 1 Broom & Had. Com. 345–347, Wait's ed.

TITLE II.

OF THE RIGHTS OF THE HUSBAND.

ARTICLE I.

WHAT RIGHTS HE ACQUIRES BY THE MARRIAGE.

Section 1. Head of the family. By the common law husband and wife are regarded as one person, and the wife's legal existence and authority are in a certain degree lost or suspended. 2 Kent's Comm. 129. In the terse language of Sir Thomas Smith, oft quoted in elementary works, "the naturalest and first conjunction of two toward the making a further society of continuance is of the husband and wife, each having care of the family: the man to get, to travel about and to defend; the wife to save, to stay at home and to distribute that which is gotten, for the nurture of the children and family; which to maintain God has given the man greater wit, better strength, better courage, to compel the woman to obey, by reason or force, and to the woman, beauty, fair countenance and sweet words, to make the man obey her again for love. Thus each obeyeth and commandeth the other; and they two together rule the house, so long as they remain in one."

The services and earnings of a married woman belong in the first instance to her husband (*National Bank of Metropolis* v. *Sprague*, 20 N. J. Eq. 13; *Birkbeck* v. *Ackroyd*, 11 Hun [N. Y.], 365); and he may bring an action in his own name to recover for her personal services. *Gould* v. *Carlton*, 55 Me. 511.

Where a wife lives with her husband at her mother's to whom she renders services for a period before her mother's death, it will be presumed that she rendered the services in behalf of her husband. *Morgan* v. *Bolles*, 36 Conn. 175.

The husband has no right to inflict corporal punishment on the wife; and any violence to her except in self-defense, or to prevent her unwarrantable interference in the exercise of his parental authority, is

illegal. *Gorman* v. *State*, 42 Tex. 221; *State* v. *Oliver*, 70 N. C. 60; *Commonwealth* v. *McAfee*, 108 Mass. 458; 11 Am. Rep. 383. But he may restrain his wife, wherever the law makes him answerable in damages for her misbehavior. *People* v. *Winters*, 2 Parker (N. Y.), 10; *Richards* v. *Richards*, 1 Grant, 389. And see *Robbins* v. *State*, 20 Ala. 36.

A husband may maintain an action, in his right as such, for damages sustained by him by being deprived of the society and assistance of his wife, by an injury caused by defendant, if her death was not immediate (*Philipi* v. *Wolff*, 14 Abb. [N. Y.] N. S. 196; *Hyatt* v. *Adams*, 16 Mich. 180; *Bream* v. *Brown*, 5 Cald. [Ky.] 168; *Mowry* v. *Chaney*, 43 Iowa, 609); or by the defendant knowingly assisting her in the violation of her duty as a wife by which the husband is deprived of her society (*Hoard* v. *Peck*, 56 Barb. [N. Y.] 202); or by the defendant enticing or keeping her away. *Barnes* v. *Allen*, 30 Barb. (N. Y.) 663; *Rabe* v. *Hanna*, 5 Ham. 530. But a stranger, in good faith acting upon the wife's complaint of her husband's ill-usage, may lawfully aid and shelter her (*Barnes* v. *Allen*, 1 Abb. [N. Y.] Ct. App. 111); and especially may her father do so. *Campbell* v. *Carter*, 3 Daly (N. Y.), 165; *Friend* v. *Thompson*, Wright, 636.

The husband has the right to select his domicile and to change his residence, and it is the duty of the wife to accompany him; if she refuses to go with him, he is not bound to afford her a support and maintenance while thus away from him without fault on his part. *Babbitt* v. *Babbitt*, 69 Ill. 277; *Angier* v. *Angier*, 7 Phil. (Penn.) 305; *Hair* v. *Hair*, 10 Rich. Eq. (S. C.) 163. Vol. 2, 620.

Any disposition of personal property and credits by a husband in good faith, where no right or interest, either present or ultimate, is reserved to him, though made to defeat the rights of his wife, will be good against her. *Padfield* v. *Padfield*, 78 Ill. 16. But he cannot by conveyance affect the inchoate right of his wife to his real estate. *Sims* v. *Ricketts*, 35 Ind. 181; 9 Am. Rep. 679.

§ 2. **Custody of children.** By the common law the father possesses the paramount right to the custody and control of his minor children and to superintend their education and nurture. But this superior legal right is subject to the control of a court of equity in two cases: *First*, when the father has abused or forfeited the right by cruelty or misconduct toward the children, or is of such character or has been guilty of such conduct, that their welfare, either physical or moral, requires that they shall be removed from him; and *Second*, where the father and mother are living separately from each other, under such circumstances as would warrant the court in granting the wife a divorce

a mensa, and the welfare of the children requires that they should live with their mother. *People* v. *Olmstead*, 27 Barb. (N. Y.) 9, and cases there cited; *Welch* v. *Welch*, 33 Wis. 535; *Cole* v. *Cole*, 23 Iowa, 433. But *it seems* that if a divorce be granted on account of the habitual drunkenness of the wife, it will not be deemed error to give to her the care and custody of two infant children, in the absence of any showing that the father was a person suitable to have such care and custody. *Brandon* v. *Brandon*, 14 Kan. 342.

In awarding the custody of a child the court will consider its future well-being. *Cole* v. *Cole*, 23 Iowa, 433. A child of tender years will be given to the mother's custody unless her character is proved unfit (*Draper* v. *Draper*, 68 Ill. 17); and the father cannot obtain the custody of a female child who has arrived at the age of fourteen years beneath her mother's care and custody, although the father is amply able properly to support such child. *Hewitt* v. *Long*, 76 Ill. 399. And the mother will be entitled to have an allowance for the support of a minor child given into her care and custody by the court. *Wilson* v. *Wilson*, 45 Cal. 399; *Buck* v. *Buck*, 60 Ill. 105, 241; *Buckminster* v. *Buckminster*, 38 Vt. 248. But the court will not make an allowance of $300 for the support of the child, when there is no evidence before it of the pecuniary circumstances of the father except that it was believed he was in easy circumstances (*Phelan* v. *Phelan*, 12 Fla. 449); and the amount allowed for such purpose is subject to subsequent modification. *Cox* v. *Cox*, 25 Ind. 303.

In a suit for divorce, if the court decree that the wife shall have the custody of the child or children, the decree constitutes her the head of the family, and it may provide that she shall have the use of the homestead. *Tiemann* v. *Tiemann*, 34 Tex. 522. The court would have no authority in a divorce case to take the custody of children from both father and mother, and give it to a stranger. *Hopkins* v. *Hopkins*, 39 Wis. 167; *contra*, *Rice* v. *Rice*, 21 Tex. 58; *Adams* v. *Adams*, 1 Duvall (Ky.), 167.

§ 3. **Wife's personal property.** At common law a husband is entitled to the personal property and *choses in action* of the wife, and they are vested in him at her death, whether reduced to his possession or not, by virtue of his marital right. *Ryder* v. *Hulse*, 24 N. Y. (10 Smith) 372; S. C., 33 Barb. 264; *Carleton* v. *Lovejoy*, 54 Me. 445; *Bell* v. *Bell*, 1 Kelly, 637. And he takes all the benefits of her industry and he can sue for them in his own name (*Gould* v. *Carlton*, 55 Me. 511; *Hoyt* v. *White*, 46 N. H. 45; *Belford* v. *Crane*, 1 Green [N. J.], 265); and the defendant cannot protect himself by showing her separate receipts. *Offley* v. *Clay*, 2 Man. & Gr. 172; *Russell* v.

Brooks, 7 Pick. 65. But see *Starrett* v. *Wynn*, 17 S. & R. 130; *Cramer* v. *Reford*, 2 C. E. Green, 367. Divorce from bed and board, or separation cannot take away his right, even though he be living apart from her in adultery (*Armstrong* v. *Armstrong*, 32 Miss. 279; *Vreeland* v. *Ryno*, 26 N. J. Eq. 160; *Turtle* v. *Muncy*, 2 J. J. Marsh. 82); and designedly left the property to her exclusive possession and control, intending that she should have a separate estate in it. *Bell* v. *Bell's Adm'r*, 36 Ala. 466.

The husband can dispose of his wife's personal property in possession as he sees fit, and after his death the title to it passes to his executors and administrators, excluding the wife though she survive him. *Cropsey* v. *McKinney*, 30 Barb. 47; *Carleton* v. *Lovejoy*, 54 Me. 445; *Hopkins* v. *Carey*, 23 Miss. 54; *Prescott* v. *Brown*, 23 Me. 305.

Whatever the interest of the wife personally may be, the husband takes that interest; as, if she be tenant in common in the property, the husband becomes tenant in common in her stead. *Hopper* v. *Mc Whorter*, 18 Ala. 229; *Green* v. *Goodall*, 1 Cold. (Tenn.) 404. If property in the hands of her guardian is legally hers at the time of the marriage, it becomes her husband's, although the guardian retain possession (*Miller* v. *Blackburn*, 14 Ind. 62; *Sallee* v. *Arnold*, 32 Mo. 532); and if the guardian, with the consent of the husband and of his ward, invest the personal property in real estate, yet on the decease of the wife before coming of age, without issue and intestate, the property descends to the husband. *Davis' Appeal*, 60 Penn. St. 118. If a wife have a vested remainder in personal estate; and both husband and wife die during the continuance of the particular estate, the husband's representatives take such remainder. *Tune* v. *Cooper*, 4 Sneed (Tenn.), 296; *Dunn* v. *Sargent*, 101 Mass. 336. If the husband survive her he can recover it when due from her administrator. *Duncan* v. *Prentice*, 4 Metc. (Ky.) 216.

The husband must reduce his wife's *choses in action* to his possession, *as husband*, or on his death his representatives have no title in them (*Tritt* v. *Colwell*, 31 Penn. St. 228; *Scawen* v. *Blunt*, 7 Ves. 294; *Crawford* v. *Brady*, 35 Ga. 184); and the wife would take as survivor (*Moyer's Appeal*, 77 Penn. St. 482; *Chappelle* v. *Olney*, 1 Sawyer, 401); or if both die before the husband reduce the *chose* to possession it goes to *his* representatives (*Westervelt* v. *Gregg*, 12 N. Y. [2 Kern.] 202; *Bryan* v. *Rooks*, 25 Ga. 622. But see *Walker* v. *Walker*, 41 Ala. 353, which holds that on the wife's death her *choses in action* not reduced to possession by the husband go to her representatives although the husband survive her.

If a *chose in action* accrue to husband and wife jointly, unless the

husband reduce it to his possession, at his death it goes to her as survivor. *Day* v. *Padrone*, 2 M. & S. 396; *Wilder* v. *Aldrich*, 2 R. I. 518; *Sanford* v. *Sanford*, 61 Barb. (N. Y.) 293; S. C., 5 Lans. 486.

The wife's *choses in action* are: Debts owing the wife, arrears of income, of rents, of profits, and outstanding loans (*Clapp* v. *Stoughton*, 10 Pick. [Mass.] 463); notes or securities taken by the husband in his own name for money belonging to the wife (*Leland* v. *Whitaker*, 23 Mich. 324; *Fowler* v. *Rice*, 31 Ind. 258); notes in which the husband is payee, turned by him to the executor of his deceased wife instead of money received by him and belonging to her estate (*Clark* v. *Shrader*, 41 Iowa, 491); damages before payment, growing out of *torts* to the person or reputation of the wife (*Anderson* v. *Anderson*, 11 Bush [Ky.], 327); the wife's share of the proceeds of her deceased father's estate, undistributed (*Hooper* v. *Howell*, 50 Ga. 165; *Smilie's Estate*, 22 Penn. St. 130; *Drury* v. *Briscoe*, 42 Md. 154); money due the wife on mortgage before foreclosure (*Turner* v. *Crane*, 1 Vern. 170); her bonds and certificates of stock (*Slaymaker* v. *Bank*, 10 Penn. St. 373); note given to the wife during coverture (*Gaters* v. *Madeley*, 6 M. & W. 423); the wife's right to personal estate of which a former husband died seized (*Harper* v. *Archer*, 28 Miss. [6 Cush.] 212; *Pickens* v. *Hill*, 30 Ind. 269; *Hair* v. *Avery*, 28 Ala. 267); a legacy to the wife (*Willis* v. *Roberts*, 48 Me. 257; *Albee* v. *Carpenter*, 12 Cush. [Mass.] 382); a decree in chancery in favor of the wife. *Lowery* v. *Craig*, 30 Miss. (1 George) 19.

The reduction to possession which makes the husband the absolute owner of the *chose in action* is not the reduction into possession of the thing itself, but of the title to it. *Tritt* v. *Colwell*, 31 Penn. St. 233.

Acts which will amount to a reduction into possession, by the husband, of the wife's *choses in action* are: the actual receipt of the *chose* by the husband with the intent to appropriate (*Lowe* v. *Cody*, 29 Ga. 117); the transfer by the husband of the wife's right, to a third person, if the transferee acquires the possession under the transfer during the *coverture* (*McCaa* v. *Woolf*, 42 Ala. 389; *Bryan* v. *Spruill*, 4 Jones' Eq. [N. C.] 27; *Lynn* v. *Bradley*, 1 Metc. [Ky.] 232); the husband's disposition by will of United States bonds purchased with funds of his insane wife, held by him as trustee, and by him kept in a separate envelope inscribed with a memorandum signed by him, declaring that they were to be disposed of, as directed in his will (*Dunn* v. *Sargent*, 101 Mass. 336); the husband's taking building materials of the maker of a note payable to his wife, in payment of the note. *Watson* v. *Robertson*, 4 Bush (Ky.), 37. A legacy to a woman before marriage is re-

duced into possession by her husband, by receiving a quit-claim deed from the testator's residuary devisee, upon condition that the husband pay all legacies which such devisee was about to pay, of which this was one (*Howard* v. *Bryant*, 9 Gray [Mass.], 239); or by a judgment in favor of husband and wife for the amount of the legacy, and an actual payment of the judgment, by the executor to their attorney. *Alexander* v. *Crittenden*, 4 Allen (Mass.), 342.

Acts which will not amount to reduction into possession by the husband of the wife's *choses in action* are, the receipt by the husband in the presence of his wife of her share of her father's estate, consisting of money and notes, and afterward collecting the amount due on the notes (*Young's Estate*, 65 Penn. St. 101); the receipt by the husband during coverture of the interest or part of the principal of a debt due the wife (*Buckingham* v. *Carter*, 2 Disney [Ohio], 4; *Nash* v. *Nash*, 2 Madd. 133); the recovery of a judgment on a note belonging to the wife in a suit brought by husband and wife jointly (*Pike* v. *Collins*, 33 Me. 43; *Mason* v. *McNeill*, 23 Ala. 201; *Crittenden* v. *Alexander*, 15 Gray [Mass.], 432); the collection of a note belonging to the wife upon an agreement with her to repay it to her with interest. *Drury* v. *Briscoe*, 42 Md. 154; *Bryant's Administrators* v. *Bryant*, 3 Bush (Ky.), 155. An agreement to sell the fund of the wife is not a reduction into possession by the husband (*Harwood* v. *Fisher*, 1 Younge & Coll. Eq. Ex. 110); the receipt by the husband of dividends accruing from stock belonging to the wife is not a reduction into possession of the stock itself, but only of the dividends. *Burr* v. *Sherwood*, 3 Bradf. (N. Y.) 85.

Nothing short of the transfer of stock standing in the wife's name to the husband's name seems to be a sufficient reduction into possession of the stock (*Arnold* v. *Ruggles*, 1 R. I. 165; *Slaymaker* v. *Bank*, 10 Penn. St. 373); and if the wife, in her husband's presence and with his consent, transfer stock belonging to her and standing in her name as a *femme sole* to her name as a *femme covert*, it will be an abandonment by the husband of his right to reduce it to possession. *Mason* v. *Fuller*, 36 Conn. 160.

When the reduction to possession is once complete no subsequent expressions of regret on the part of the husband will revive the wife's right, or render him her debtor or trustee for the amount converted. *Nolen's Appeal*, 23 Penn. St. 37; *Machen's Executor* v. *Machen*, 38 Ala. 364. But the wife's property must come into the husband's possession, *as husband*, or she takes as survivor instead of his personal representatives. *Moyer's Appeal*, 77 Penn. St. 482. The disclaimer by the husband of a conversion to his own use of his wife's money must

be deliberate, precise and clearly proved. *Wesco's Appeal*, 52 Penn. St. 195.

At common law a note to the wife, *prima facie* belongs to the husband and can only be indorsed by him (*Tryon* v. *Sutton*, 13 Cal. 490; *Holland* v. *Moody*, 12 Ind. 170); and the legal effect of a note made payable to the wife, or to the husband and wife in the alternative, is that the husband is payee. *Younge* v. *Ward*, 21 Ill. 223; *Wildman* v. *Wildman*, 9 Ves. Jr. 174; *Twisden* v. *Wise*, 1 Vern. 161.

A general assignment in bankruptcy or insolvency by the husband passes, at law, the wife's property. In equity, the assignees are permitted to take the same interest in the wife's *choses in action*, as the husband possessed and no more, and unless they reduce them into possession during her husband's life-time, she will be entitled to them by survivorship. *Sherrington* v. *Yates*, 12 M. & W. 885; *Moore* v. *Moore*, 14 B. Monr. 208; *Poor* v. *Hazleton*, 15 N. H. 564. And by the English rule approved most frequently in our courts, whatever the nature of the assignment, whether in bankruptcy, to trustees for payment of debts, or to a specific purchaser for value, it could pass the husband's interest and no more; the assignee must afterward reduce the property to possession during the husband's life-time, and no assignment is possible of the wife's reversionary interest, so as to bar her as survivor, provided the interest continued reversionary. *Purdew* v. *Jackson*, 1 Russ. 1; *Needles* v. *Needles*, 7 Ohio St. 432; *George* v. *Goldsby*, 23 Ala. 326. Later English decisions suggest and approve a distinction between the cases where the husband can completely appropriate, at the time of the assignment, and those where he cannot; the assignment might stand in the former instance as an agreement to appropriate, or a sort of an equitable reduction into possession. *Honner* v. *Morton*, 3 Russ. 65; *Tidd* v. *Lister*, 17 E. L. & Eq. 567; S. C., 3 DeG. M. & G. 857.

A husband surviving his wife may by will or otherwise dispose of a paid policy of insurance on his own life procured for her benefit. *Kerman* v. *Howard*, 23 Wis. 108. And he is entitled to a legacy to his wife, not received by her nor by him reduced to possession during her life-time. *Vreeland* v. *Ryno*, 26 N. J. Eq. 160.

When a wife pays to her husband with her own hand money of her separate property, he can apply it to the use of either or both of them at his discretion, unless it appears that he received it in trust for her. *Jacobs* v. *Hesler*, 113 Mass. 157. And where she holds lands simply as her own, and in which the husband has marital rights, if she join in a sale thereof, and the proceeds are collected by him in his own name, used as he uses his other funds, there being no contract or un-

derstanding with the wife in regard to them, they become the property of the husband (*Tillman* v. *Tillman*, 50 Mo. 40; *Hamlin* v. *Jones*, 20 Wis. 536); not so if there be an agreement between them that she should have another tract of land in lieu thereof. *Dula* v. *Young*, 70 N. C. 450.

The husband can release a legacy bequeathed to his wife, so as to bar her interest in it. *Weems* v. *Weems*, 19 Md. 334. And his receipt in full to his wife's guardian for her statutory separate estate is, if unimpeached, a full discharge, in law and in equity, of the guardianship. *Mobley* v. *Leophart*, 47 Ala. 257.

At common law the wife's paraphernalia during *coverture* ordinarily belongs to the husband and he can dispose of them, but he cannot dispose of them by will; and if the wife survive him, she can claim them against all persons, except the husband's creditors. *Rawson* v. *Pennsylvania R. R. Co.*, 48 N. Y. (3 Sick.) 212. And her personal apparel purchased with her husband's consent with their *joint* earnings, remains his property. *Hawkins* v. *Providence, etc., R. R. Co.*, 119 Mass. 596; 20 Am. Rep. 353.

The erection of buildings by the husband on the leasehold lands of the wife, and his collecting the rents, is not such a disposition of them as to take away her right of survivorship. *Riley* v. *Riley*, 4 Green (N. J.), 229. And a husband cannot maintain an action against a savings bank for its refusal to pay him money which he has deposited in the name of his wife. *Sweeny* v. *Boston Five Cents Savings Bank*, 116 Mass. 384.

Where the equity of redemption of land upon which a married woman has a mortgage is held by her husband, her right to enter to foreclose is suspended during his life-time (*Tucker* v. *Fenno*, 110 Mass. 311); and conversely as to the husband. *Cormerais* v. *Wesselhoeft*, 114 Mass. 515.

A husband may surrender to his wife the right to her personal property which the law gives him by reason of the marriage; he may do this by an ante-nuptial contract to that effect, by allowing her to claim and to control for a long time, property given her during the coverture as her separate property, and refraining from exercising the right which the law gives him to take from her such property and use it as his own, and by making gifts himself to his wife. *Bent* v. *Bent*, 44 Vt. 555; *Mason* v. *Fuller*, 36 Conn. 160.

The courts of any State will presume that the common law prevails in any other State from which the husband and wife came, and the ownership of the wife's personalty, brought with them, will be governed

by it. *Lichtenberger* v. *Graham*, 50 Ind. 288; *Tinkler* v. *Cox*, 68 Ill. 119; *Oliver* v. *Robertson*, 41 Tex. 422.

§ 4. **Wife's realty and chattels real.** Upon marriage the husband becomes entitled to a freehold in his own right in the real estate of his wife; it is a subject upon which a devise of the wife cannot operate (*Clarke's Appeal*, 79 Penn. St. 376); nor is this right affected by the fact that in consequence of his cruelty, the wife has been compelled to leave him, and lives separately from him and earns her own support. *Van Note* v. *Downey*, 4 Dutch. (N. J.) 219.

In the absence of any statutory provision this estate continues during the coverture, and the husband during that time is entitled to the possession and management of his wife's real estate and to receive the rents and profits thereof (*Nunn* v. *Givhan*, 45 Ala. 370); this, too, if the lands are held by her in joint tenancy. *Bishop* v. *Blair*, 36 Ala. 80; *Royston* v. *Royston*, 21 Ga. 161. The husband may convey this estate by his own deed to another (*Trask* v. *Patterson*, 29 Me. [16 Shep.] 499); but on the termination of the coverture, the wife will be remitted to her right of action to recover the possession. *Coleman* v. *Satterfield*, 2 Head (Tenn.), 259; *Junction R. R. Co.* v. *Harris*, 9 Ind. 184.

If there has been a child of the marriage born alive, the husband takes an estate for his own life as tenant by the curtesy. *Porch* v. *Fries*, 3 Green (N. J.), 204. And the husband's life estate is a freehold. *Kibbie* v. *Williams*, 58 Ill. 30. And if the lands of the wife be sold under a decree for partition the husband will be entitled to a life estate in the proceeds. *Forbes* v. *Smith*, 5 Ired. Eq. 369. *Martin* v. *Martin*, 1 N. Y. (1 Comst.) 473, holds that the proceeds belong absolutely to the husband, subject only to the right of the wife to have out of it her support. See, too, *Ellsworth* v. *Hinds*, 5 Wis. 613; *Jones* v. *Plummer*, 20 Md. 416; *Osborne* v. *Edwards*, 3 Stockt. 73. A husband may demand and reduce into possession his wife's legacy, even though it be made payable by the terms of a will from proceeds of the sale of testator's real estate. *Thomas* v. *Wood*, 1 Md. Ch. 296.

A husband has no right to commit waste on the lands of his wife (*Stroebe* v. *Fehl*, 22 Wis. 337; *Babb* v. *Perley*, 1 Me. 6; *Mattocks* v. *Stearns*, 9 Vt. 326); or on lands which he holds by the curtesy. *Porch* v. *Fries*, 3 Green (N. J.), 204.

A husband has no interest in a life estate conveyed to his wife for her own life, except the right to receive the rents and profits thereof during coverture. *Gray* v. *Mathis*, 7 Jones' Law (N. C.), 502. But if she have an estate for the life of another person who survives her the husband becomes a special occupant of the land during the life of

such other person. The marriage of a female who owned an interest in wild lands will pass the title to the same to the husband, and on his death, it would pass to his heirs and not to his wife as survivor. *Hooper* v. *Howell*, 52 Ga. 315. And the husband of a devisee for life, in possession and residing with his wife will, at her death, be entitled to the whole of a crop which he had planted but had not then severed. *Spencer* v. *Lewis*, 1 Houst. (Del.) 223.

A husband cannot incumber his wife's property without her consent even for necessary repairs (*Dearie* v. *Martin*, 78 Penn. St. 55; *Knott* v. *Carpenter*, 3 Head [Tenn.], 542; *Pell* v. *Cole*, 2 Metc. [Ky.] 252); nor can he, by parol, release a tenant from payment of rent on the wife's land (*Silvey* v. *Summer*, 61 Mo. 253); but he may incumber his own interest in the property (*Kay* v. *Whittaker*, 44 N. Y. [5 Hand] 565; *Miller* v. *Shackleford*, 3 Dana, 291); and there is no mode of conveyance in the English law by which he can incumber or convey more. *Robertson* v. *Norris*, 11 Q. B. 916. The wife, notwithstanding any conveyance or alienation, may enter after his death and hold possession. *Butterfield* v. *Beall*, 3 Ind. 203; *Huff* v. *Price*, 50 Mo. 228. If the wife merely join with her husband in a promissory note given for labor and materials bestowed upon her real property it will not create a charge upon her land, nor be the basis of a mechanic's lien. *Johnson* v. *Tutewiler*, 35 Ind. 353.

An act for the better protection and securing of the property of a married woman does not affect the estate of a husband in lands conveyed to the wife after marriage and before the passage of the act; and such estate is liable for the husband's debts. *Prall* v. *Smith*, 2 Vroom (N. J.), 244. And a woman who is married a second time cannot recover from the estate of her second husband, her annual dower interest in the lands of her first husband's estate, which were bought by husband No. 2 before the passage of such act. *Mann's Appeal*, 50 Penn. St. 375; *Van Note* v. *Downey*, 4 Dutch. (N. J.) 219.

A husband cannot, without authority, contract for the sale of his wife's lands and deliver a deed to that effect. Before the wife can be held to perform the contract it must be ratified by her with a full knowledge of the material facts (*Ladd* v. *Hildebrant*, 27 Wis. 135; 9 Am. Rep. 445); and if, in an action of ejectment against him for his wife's lands, he confess judgment, she has a right to have it set aside and a defense allowed. *Lewis* v. *Brewster*, 57 Penn. St. 410. And the acquiescence of the husband in line fences and boundaries of land will not affect the right of the wife, when the land is her separate estate. *Sawyer* v. *Coolidge*, 34 Vt. (5 Shaw) 303.

In all cases, emblements or growing crops go to the husband, or to

his representatives at the termination of his estate. *Weems* v. *Bryan*, 21 Ala. 302; *Spencer* v. *Lewis*, 1 Houst. (Del.) 223. And the husband's lease in right of his wife operates so far in the tenant's favor as to entitle the latter to emblements. *Rowney's Case*, 2 Vern. 322; *Gould* v. *Webster*, 1 Tyler (Vt.), 409. The rents and profits of real estate held in actual possession by a coparcener with the wife belong absolutely to the husband and he may maintain an action for them without joining his wife. *Dold* v. *Geiger*, 2 Gratt. 98.

Land purchased by a married woman with the proceeds of a legacy given to her by one of her relatives, which the husband has declined to reduce to his possession, is not chargeable with the debts of the husband. *Coffin* v. *Morrill*, 2 Fost. (N. H.) 352. And where land is given to a married woman in lieu of a legacy to which she was entitled, the husband having effected no prior reduction of the legacy, it is to be held as hers and for her sole benefit. *Davis* v. *Davis*, 46 Penn. St. 342; *Kempe* v. *Pintard*, 32 Miss. 324. And where the wife has a right of election between money and land, the husband may elect for the wife, and if he elect land, she becomes the owner of the fee subject to his life estate. *Shallenberger* v. *Ashworth*, 25 Penn. St. (1 Casey) 152.

Where a leasehold interest was conveyed to a husband and wife, and the reversion was afterward conveyed to the husband alone "to be held by him, his heirs and assigns in fee simple," that the rent might "cease and determine," and for "the purpose of extinguishing the ground rent" reserved in the lease; it was held that in the absence of proof to sustain a separate estate in the wife, according to the acts on that subject, the marital right of the husband to extinguish the leasehold interest was unquestionable, and that the conveyance to him of the reversion had that effect. *Lawes* v. *Lumpkin*, 18 Md. 334. If a testator devise certain leasehold property to his daughter for her sole and separate use and benefit, without being subject to the control and disposal of any husband she might afterward marry, but making no limitation over of the property after the death of the devisee; and if the daughter afterward marry and die intestate and without issue, the property passes absolutely to the husband in his own right. *Cooney* v. *Woodburn*, 33 Md. 320.

If a married woman, having a vested remainder in lands, die before the termination of the life estate, her husband cannot take an estate by the curtesy. *Moore* v. *Calvert*, 6 Bush (Ky.), 356. And if land be equitably owned by the wife, the legal estate being in her guardian, and conveyed to husband and wife jointly, on the death of the wife the husband is not entitled to the land. *Moore* v. *Moore*, 12 B. Monr.

651. The joinder of husband and wife in a mortgage to secure promissory notes given by her for the balance of purchase-money of real estate bought by her, will not give him any legal or equitable interest therein. *Conrad* v. *Shomo*, 44 Penn. St. (8 Wright) 193. But where, subsequent to the sale of real estate, a married woman entitled to a distributive share of the proceeds thereof dies, her husband is entitled to such share. *Jones* v. *Plummer*, 20 Md. 416. The husband of an infant succeeds to the place of her guardian, all other guardianship being by marriage terminated. *Bartlett* v. *Cowles*, 15 Gray (Mass.), 445. The husband of a *guardian* has no right to possess or control the estate of her ward; and a payment to him on account of such estate is void, unless with the express sanction or direction of the guardian. *Holmes* v. *Field*, 12 Ill. 424.

A husband cannot be deprived of his right to property given to his wife, except by clear and unequivocal language, leaving no reasonable doubt that such was the purpose of the donor. *Ashcraft* v. *Little*, 4 Ired. Eq. 236. And if a wife on the day of her marriage convey to a third party her real estate without consideration, it will *prima facie* be in fraud of her husband's marital rights, and the burden of showing that the facts had been communicated to the husband will be upon the grantor. *Robinson* v. *Buck*, 71 Penn. St. 386. So of a conveyance or transfer before marriage, but after engagement. *Goddard* v. *Snow*, 1 Russ. 485; *Prideaux* v. *Lonsdale*, 4 Giff. 159; 1 De G. J. & S. 433; *Donnes* v. *Jennings*, 32 Beav. 290.

Possession by the husband of property to which a trust in favor of his wife has attached is the possession of the wife. *Robison* v. *Robison*, 44 Ala. 227. And possession by some coparceners, amicable as to the others, is a sufficient seisin in fact to invest and sustain an estate by the curtesy in the husbands of such others. *Carr* v. *Givens*, 9 Bush (Ky.), 679; 15 Am. Rep. 747. If a husband be in possession of land under a claim of title, his title will not be affected by the act of a third person who pretends to put his wife in possession. *Powell* v. *Felton*, 11 Ired. 469. And if a husband and his wife convey the equity of redemption in land belonging to the wife to a trustee to sell the same for their benefit, it will amount to a conversion of the land into personalty, although the land may not have been sold under the trust. *Siter* v. *McClanachan*, 2 Gratt. 280.

A husband cannot, by virtue of his marriage, be considered a purchaser, for valuable consideration against a legal title admitted to be valid by his wife before marriage. *Willis* v. *Snelling*, 6 Rich. (S. C.) 280. And he cannot, by a deed executed after his wife's death, confirm a deed of her land, executed by her alone during coverture, as

against her heirs. *Dow* v. *Jewell*, 1 Fost. (N. H.) 470. If the husband convey his life estate in land held in the right of his wife, in fraud of his creditors, the latter may levy upon the growing crops. *Stehman* v. *Huber*, 21 Penn. St. (9 Harris) 260.

Where a husband, in right of his wife, accepts lands at their appraised value, under a partition in the orphan's court of the estate of the wife's ancestor, and enters into recognizances to pay the valuation to the other heirs, he acquires a life estate in his wife's share of the lands, and a fee simple in his own right in the residue. *Snevily* v. *Wagner*, 8 Penn. St. 396. And if a husband erect a house on land conveyed to him, and his wife and the heirs of his wife, the husband and his creditors would be entitled to the compensation payable for the use of the party wall by a person building on the next lot. *Davids* v. *Harris*, 9 Penn. St. 501.

A husband after the death of his wife may maintain an action to recover for use and occupation of the wife's real estate, by the permission of the plaintiff and his wife during coverture. *Jones* v. *Patterson*, 11 Barb. (N. Y.) 572.

The husband's interest in his wife's chattels real may be termed an interest in his wife's right, with a power of alienation during coverture; and an interest in possession, since such chattels are already in possession but lying in action. *Mitford* v. *Mitford*, 9 Ves. 98. The wife's chattels real may be taken on execution for the debts of the husband while the coverture lasts. *Miles* v. *Williams*, 1 P. Wms. 258. And the husband may bequeath them by will executed during marriage; but if the husband die first, the wife will take them in her own right, unaffected by any will which he may have made, or by any charge which he may have created. *Roberts* v. *Polgrean*, 1 H. Bl. 535. The husband may dispose of them absolutely during the marriage, either with or without consideration (*Jackson* v. *McConnell*, 19 Wend. 175); but in order to make it effectual the right of the party in whose favor the disposition is made must commence *in interest* if not *in possession* during the life of the husband. *Grute* v. *Locroft*, Cro. Eliz. 287.

The husband may defeat the wife's survivorship to her chattels real by a disseverance of his wife's joint tenancy during coverture (Co. Litt. 185 b.); by his criminal acts (*Steed* v. *Cragh*, 9 Mod. 43); an award of the term to the husband if carried into effect. *Oglander* v. *Baston*, 1 Vern. 396. But it is not defeated by such acts as erecting buildings on the leasehold premises; and making a mortgage, sale or lease of part, bars the wife only as to so much. *Riley* v. *Riley*, 4 Green (N. J.), 229.

§ 5. **Administration on wife's estate.** At common law, if the husband survive the wife, he has the sole right to administer as to the *choses in action* of his wife not reduced to his possession during her life-time, for his own benefit and enjoyment in preference to the next of kin, even to the exclusion of the children of the marriage. And this right is continued under the statute of distribution in most of our States. *Ransom* v. *Nichols*, 22 N. Y. (8 Smith) 110; *Jones* v. *Brown*, 34 N. H. 439; *Rice* v. *Thompson*, 14 B. Monr. 304; *Stockett* v. *Bird*, 18 Md. 484; *Williams* v. *Carle*, 2 Stockt. 543; *Clay* v. *Irvine*, 4 W. & S. 232; *Pickens* v. *Hill*, 30 Ind. 269; *Walker* v. *Walker*, 25 Mo. 367; *Donnington* v. *Mitchell*, 1 Green's Ch. 243. Not so in other States. See *Curry* v. *Fulkinson*, 14 Ohio, 100; *Baldwin* v. *Carter*, 17 Conn. 201; *Holmes* v. *Holmes*, 28 Vt. 765; *Nelson* v. *Goree*, 34 Ala. 565; *Cox* v. *Morrow*, 14 Ark. 603.

The foundation of this right has been attributed by some to the statute of Edward III, on the ground that the husband was "the next and most lawful friend" of his wife (*Fortre* v. *Fortre*, 1 Show. 351); and by others to a common law right, *jure mariti*, independent of any statute. *Watt* v. *Watt*, 3 Ves. Jr. 247. The husband becomes entitled to the estate of his deceased wife by virtue of his right to administer. This right does not depend upon a title existing during marriage, but upon that which he acquired upon her death by the exclusive right to administer her estate as her successor. *Barnes* v. *Underwood*, 47 N. Y. (2 Sick.) 351. Instead of the husband having a right to administer because he was entitled to the estate, *e converso* he became entitled to the estate because he had a right to administer, the statute of distributions never having deprived him of the interest in the residue of the estate, which before the passage of that statute had been enjoyed by all administrators. Ib.; *McCosker* v. *Golden*, 1 Bradf. (N. Y.) 64. If the wife's next of kin administer, he will be a trustee for the husband or his representatives. *Betts* v. *Kimpton*, 2 B. & A. 273; *Whitaker* v. *Whitaker*, 6 Johns. (N. Y.) 112.

No administration is necessary as to property the title to which had vested in the husband during marriage. *Barnes* v. *Underwood*, 47 N. Y. (2 Sick.) 351.

TITLE III.

OF THE DUTIES AND LIABILITIES OF THE HUSBAND.

Section 1. To support wife. A husband is legally bound for the supply of necessaries to his wife, so long as she does not violate her

duty as wife; and he may discharge this obligation by supplying her with necessaries himself, or by his agents, or by giving her an adequate allowance in money (*Manby* v. *Scott*, 1 Sid. 109; 1 Mod. 124; 2 Smith's L. C. 406, 417; *Etherington* v. *Parrot*, 2 Ld. Raym. 1006; *Harshaw* v. *Merryman*, 18 Mo. [3 Bennett] 106); and then he is not liable to a tradesman, who without his authority furnishes her with necessaries; but if he do not himself provide for her support, he is legally liable for necessaries furnished to her by tradesmen, even though against his orders. *Cromwell* v. *Benjamin*, 41 Barb. (N. Y.) 558; *Tebbets* v. *Hapgood*, 34 N. H. 420; *Gilman* v. *Andrus*, 2 Wms. (28 Vt.) 241. The husband's being a minor will not affect the liability. *Cantine* v. *Phillips*, 5 Harring. (Del.) 428; *Bush* v. *Lindsey*, 14 Ga. 687. And if the husband furnishes his wife with no money, and without expressing disapprobation sees her wear clothing which he knows was bought on his credit, he must pay for it. *Ogden* v. *Prentice*, 33 Barb. 160. But a husband not cruel to his wife and willing to provide her with proper necessaries at home is not bound to furnish them elsewhere. *Morgan* v. *Hughes*, 20 Texas, 141; *Jolly* v. *Rees*, 15 C. B. (N. S.) 628.

A man who cohabits with a woman, holding her out as his wife, is liable for necessaries furnished her upon the strength of her conjugal rights. *Johnston* v. *Allen*, 3 Daly (N. Y.), 43; 6 Abb. (N. S.) 306; 39 How. 506; *Watson* v. *Threlkeld*, 2 Esp. 637.

A husband who has received a large estate by his wife is legally bound to pay for necessaries furnished her while an infant. *Bonney* v. *Reardin*, 6 Bush (Ky.), 34; *Nicholson* v. *Wilborn*, 13 Ga. 467. He is bound to support her out of his own property if he can do so, without resorting to her separate property. *Callahan* v. *Patterson*, 4 Texas, 61; *Neil* v. *Johnson*, 11 Ala. 615.

The wife has authority to contract for things that are really necessary and suitable to the style in which the husband chooses to live, in so far as the articles fall fairly within the domestic department which is ordinarily confided to the management of the wife. *Phillipson* v. *Hayter*, L. R., 6 C. P. 38; *Clark* v. *Cox*, 32 Mich. 204. And if the tradesman supply the wife with articles which were not necessaries, also, he can yet recover for such articles supplied as were necessaries. *Eames* v. *Sweetser*, 101 Mass. 78. If the wife is entirely unprovided for, by her husband, she may sell such of his personal property as will supply her necessities. *Ahern* v. *Easterby*, 42 Conn. 546.

The husband is not responsible even for necessaries furnished the wife, when residing apart from him, if she left him without good cause and without his consent (*Oinson* v. *Heritage*, 45 Ind. 73; 15 Am. Rep.

258; *Harttmann* v. *Tegart*, 12 Kan. 177; *Brown* v. *Mudgett*, 40 Vt. 68); but if the separation was caused by improper treatment on his part, or he sends her away, or if they separate by consent without any provision for her maintenance, he will be liable for her necessary support, and to that extent he sends credit with her. *Ross* v. *Ross*, 69 Ill. 569; *Pierce* v. *Pierce*, 9 Hun (N. Y.), 50; *Roney* v. *Wood*, 1 Wils. (Ind.) 378. If he abandon her without criminality on her part, and without adequate means of support, a bill in equity will lie to compel the husband to support her without asking for a decree of divorce. *Garland* v. *Garland*, 50 Miss. 694; *Trotter* v. *Trotter*, 77 Ill. 510. If she go, an invalid, to her father's house, and the husband promises to support her there, and afterward publishes a notice not to trust her on his account; even if this notice come to the knowledge of the father he can recover for her maintenance against the husband. *Daubney* v. *Hughes*, 60 N. Y. (15 Sick.) 187; S. C., 3 T. & C. 350. But if one receives into his house a woman who was forced to leave her husband on account of his cruelty, he cannot recover from the husband for her maintenance, if one of his motives for maintaining her was that he might have adulterous intercourse with her. *Almy* v. *Wilcox*, 110 Mass. 442.

If the husband by his indecent conduct renders his house unfit for occupancy by a modest woman, his wife may leave him and pledge his credit elsewhere. *Liddlow* v. *Wilmot*, 2 Stark. 77; S. C., 1 Selw. N. P. 298; *Hultz* v. *Gibbs*, 66 Penn. St. 360; *Bazeley* v. *Forder*, L. R., 3 Q. B. 559; *Sykes* v. *Halstead*, 1 Sandf. (N. Y.) 483.

In order to maintain an action against a husband for articles sold to his wife without his authority while they are living together, it must appear that he neglected to furnish her a suitable support, and that the goods were reasonably necessary, having regard to his condition in life. *Raynes* v. *Bennett*, 114 Mass. 424; *Snover* v. *Blair*, 1 Dutch. (N. J.) 94; *Theriott* v. *Bagioli*, 9 Bosw. (N. Y.) 578. The special circumstances which make the husband liable for necessaries sold to his wife without his consent, must always be alleged and proved (*Brown* v. *Worden*, 39 Wis. 432; *Woodward* v. *Barnes*, 43 Vt. 330; *Rea* v. *Durkee*, 25 Ill. 503); what are such special circumstances, see *McMillen* v. *Lee*, 78 Ill. 443; *Gotts* v. *Clark*, id. 229; and *Clark* v. *Cox*, 32 Mich. 204.

The plaintiff must show not only that what he sold to the wife were necessaries, but that the husband failed to furnish her an adequate supply. *Barr* v. *Armstrong*, 56 Mo. 577; *Keller* v. *Phillips*, 39 N. Y. (12 Tiff.) 351; S. C., 40 Barb. 390. But he need not show that the husband refused to support his family (*Rigoney* v. *Neiman*, 73

Penn. St. 330), or that he took pains to learn the husband's circumstances or the wife's necessities. *Eames* v. *Sweetser*, 101 Mass. 78. The husband's liability depends wholly upon his *legal* obligation to provide for the wife, not upon the trader's knowledge or ignorance of his domestic affairs. *Gill* v. *Read*, 5 R. I. 343; *Billings* v. *Pilcher*, 7 B. Monr. 458. A husband cannot be made liable without his consent, upon contracts made by the wife in her own name and on her own behalf, and where the credit is given to her and not to him. *Bugbee* v. *Blood*, 48 Vt. 497.

It will be no defense to a suit brought for the value of necessaries furnished to the wife that a suit for a divorce was pending, unless alimony had been allowed by the court (*Johnston* v. *Allen*, 39 How. [N. Y.] 506; 6 Abb. [N. S.] 306; 3 Daly, 433); or unless a divorce on account of the wife's adultery had been decreed. *Needham* v. *Bremner*, L. R., 1 C. P. 582.

Necessaries are such articles as are essential to the wife's health and comfort; and it is for the jury to determine what they are under the circumstances of each particular case. *Hall* v. *Weir*, 1 Allen (Mass.), 261; *Jewsbury* v. *Newbold*, 40 Eng. L. & Eq. 518; *Parke* v. *Kleeber*, 37 Penn. St. 251.

Among many other things, the following are deemed necessaries: Expenses incurred in defending the wife's good name in an action against her for divorce on account of adultery (*Porter* v. *Briggs*, 38 Iowa, 166; 18 Am. Rep. 27); her expenses in proceedings instituted by the husband to compel her to find sureties to keep the peace *Warner* v. *Ryan*, 28 Wis. 577; 9 Am. Rep. 515); medicines, medical attendance and reasonable expenses during illness (*Cothran* v. *Lee*, 24 Ala. 380; *Harris* v. *Lee*, 1 P. Wms. 82; *Mayhew* v. *Thayer*, 8 Gray [Mass.], 172); reasonable expenses for the burial of the remains of her who was forced to leave her husband's house on account of his cruelty (*Cunningham* v. *Reardon*, 98 Mass. 538); or who left her husband with his consent (*Carley* v. *Green*, 12 Allen [Mass.], 104; *Bradshaw* v. *Beard*, 12 C. B. [N. S.] 344; *Ambrose* v. *Kerrison*, 4 Eng. L. & Eq. 361); furniture of a house for a wife to whom had been decreed as alimony the sum of £380 per annum (*Hunt* v. *De Blaquiere*, 5 Bing. 550); repairs to the homestead during the protracted absence of the husband (*McAfee* v. *Robertson*, 41 Tex. 355); fees to a solicitor for drawing marriage settlement (*Helps* v. *Clayton*, 17 C. B. [N. S.] 553); legal expenses incurred preliminary and incidental to a suit for restitution of conjugal rights, and in obtaining professional advice as to the proper method of dealing with tradesmen who were pressing their bills (*Wilson* v. *Ford*, L. R.,

3 Ex. 66); expenses in proceeding against the husband on complaint of the wife for breach of the peace (*Morris* v. *Palmer*, 39 N. H. 123); a horse worth $45 for the invalid wife of a miller earning $30 per month, in order that she might take exercise as advised by a physician (*Cornelia* v. *Ellis*, 11 Ill. 584); the costs of divorce proceedings, including proctor's fees, where the wife had reasonable grounds for instituting the proceedings (*Brown* v. *Ackroyd*, 34 Eng. L. & Eq. 214); household supplies, reasonable and proper for the ordinary use of a family, although the wife receives the earnings of two daughters living with her (*Hall* v. *Weir*, 1 Allen [Mass.], 261); a piano (*Parke* v. *Kleeber*, 37 Penn. St. 251); a set of false teeth (*Gilman* v. *Andrus*, 28 Vt. 241); wife's support in an insane asylum (*Wray* v. *Wray*, 33 Ala. 187); her support as a pauper (*Monson* v. *Williams*, 6 Gray [Mass.], 416); not, however, if the husband be of sufficient ability to support her, although he refuses to do so. *Norton* v. *Rhodes*, 18 Barb. (N. Y.) 100; *Commissioners, etc.*, v. *Hildebrand*, 1 Carter (Ind.), 555; S. C., 1 Smith, 361.

What are not deemed necessaries, the value of which could be recovered against the husband among other things, are: A hat worth $12.50, as a present to a friend (*Sulter* v. *Mustin*, 50 Ga. 242); articles of jewelry for the wife of a special pleader (*Montague* v. *Benedict*, 3 B. & C. 631); the rent of a church pew (*St. John's Parish* v. *Bronson*, 40 Conn. 75; 16 Am. Rep. 17); physician's services rendered the wife on her credit (*Carter* v. *Howard*, 39 Vt. 106); the services of a quack (*Wood* v. *O'Kelley*, 8 Cush. 406); a deed of separation (*Ladd* v. *Lynn*, 2 M. & W. 265); furniture sold to the wife solely on her credit (*Hill* v. *Goodrich*, 46 N. H. 41); services of the wife's attorney in a proceeding brought on her complaint against the husband for an assault and battery (*Smith* v. *Davis*, 45 N. H. 566; *Grindell* v. *Godmond*, 5 A. & E. 755); or in a suit for a divorce, the wife being plaintiff or defendant (*Ray* v. *Adden*, 50 N. H. 82; 9 Am. Rep. 175; *Coffin* v. *Dunham*, 8 Cush. 404; *Johnson* v. *Williams*, 3 Iowa, 97); money lent to the wife for the purchase of necessaries, unless at the husband's request (*Stone* v. *McNair*, 7 Taunt. 432; *Walker* v. *Simpson*, 7 W. & S. 83); in equity the lender would take the place of the tradesman (*Harris* v. *Lee*, 1 P. Wms. 482; *Schullhofer* v. *Metzger*, 7 Rob. [N. Y.] 576; *Jenner* v. *Morris*, 1 Drew. & Sm. 218); money lent for the purchase of a passage ticket to enable the wife to join her husband (*Knox* v. *Bushell*, 3 C.B. [N. S.] 334); labor and services of slaves applied to the wife's support and maintenance (*Zeigler* v. *David*, 23 Ala. 127); a bill for dress where the wife had an allowance for the same. *Renaux* v. *Teakle*, 20 Eng. L. & Eq. 345.

The wife of a lunatic, confined in an asylum, may pledge his credit for necessaries and the husband may be sued for the debt. *Read* v. *Legard*, 4 Eng. L. & Eq. 523. But where a married woman, in prison for the non-payment of fines, imposed for the violation of the statute prohibiting the sale of intoxicating drinks, gave certain promissory notes required to procure her release, the husband was held not liable therefor. *Bates* v. *Enright*, 42 Me. 105.

In an action for goods supplied to the wife on her order alone, the question is, in the absence of such evidence of necessity, as may show an agency in law, not whether the goods were necessaries; but whether there was an agency or authority in fact. *Read* v. *Teakle*, 24 Eng. L. & Eq. 332; *Sawyer* v. *Cutting*, 23 Vt. 486; *Ruddock* v. *Marsh*, 38 Eng. L. & Eq. 515.

§ 2. **To pay wife's debts, etc.** For the debts of the wife, contracted before coverture, the husband is liable at any time before she dies, but not afterward, whether he received property from her or not. *Morrow* v. *Whitesides*, 10 B. Monr. 411; *Heard* v. *Stamford*, 3 P. Wms. 409; *Lamb* v. *Belden*, 16 Ark. 539. His liability, so far as the rights of third parties are concerned, by any ante-nuptial agreement between himself and his wife, can in no way be affected. *Harrison* v. *Trader*, 27 Ark. 288. An infant husband is bound equally with one who has attained his majority. *Butler* v. *Breck*, 7 Metc. 164; *Cole* v. *Seeley*, 25 Vt. 220; *Roach* v. *Quick*, 9 Wend. 238. If during coverture a judgment against the husband and wife be obtained on the wife's ante-nuptial indebtedness, such judgment may be enforced after the death of the wife. *Lamb* v. *Belden*, 16 Ark. 539; *Obrian* v. *Ram*, 3 Mod. 186.

And the wife's *choses in action*, in his hands as her administrator, would be liable for her debts *dum sola*. *Jones* v. *Walkup*, 5 Sneed (Tenn.), 135; *Day* v. *Messick*, 1 Houst. (Del.) 328. But property which the husband had obtained and reduced to his possession by virtue of his marital rights during coverture, would not be liable therefor, and any parol promise he may have made during coverture, to pay these debts, would create no additional liability. *Cole* v. *Shurtleff*, 41 Vt. 311.

The estate of a deceased husband is not liable for the ante-nuptial debts of the wife (*Cureton* v. *Moore*, 2 Jones' Eq. [N. C.] 204; *Woodman* v. *Chapman*, 1 Camp. 189); unless judgment therefor had been recovered against him in his life-time. *Burton* v. *Burton*, 5 Harring. 441.

The death of the wife after action commenced on her ante-nuptial debt, but before judgment, puts an end to the suit. *Williams* v. *Kent*, 15 Wend. 360.

Where a woman is deserted by her first husband, is divorced and marries again, her second husband is liable for her debts while so deserted. *Prescott* v. *Fisher*, 22 Ill. 390. But where a widow administered upon the estate of her first husband, the second husband cannot be made responsible for receipts prior to his marriage, without she is a party to the bill, and those receipts are put in issue by the proper allegations. *Magruder* v. *Darnall*, 6 Gill, 269.

The general rule is, that the wife cannot make any contract to bind her husband without his authority, express or implied, except, perhaps, in case of necessity for the immediate use of the family. *Fredd* v. *Eves*, 4 Harring. (Del.) 385; *Ahern* v. *Easterby*, 42 Conn. 546. And certainly she cannot bind him by a contract made in her own name and on her own credit. *Bugbee* v. *Blood*, 48 Vt. 497; *Tuttle* v. *Hoag*, 46 Mo. 38; 2 Am. Rep. 481; *Weisker* v. *Lowenthal*, 31 Md. 413. She cannot give an irrevocable license to enter upon her husband's real estate (*Nelson* v. *Garey*, 114 Mass. 418); nor can she give such a license in any case. *Tayler* v. *Fisher*, Cro. Eliz. 246; *Haight* v. *Badgeley*, 15 Barb. 502; *Humes* v. *Taber*, 1 R. I. 464. She cannot transfer the property of her insane husband to pay a particular creditor in preference to others. *Alexander* v. *Miller*, 16 Penn. St. (4 Harris) 215. And unless it is shown that she indorsed a promissory note with his authority, the husband is not liable thereon. *Leeds* v. *Vail*, 15 Penn. St. 185.

But the acts of the wife in relation to his property in his absence will bind the husband unless, within a reasonable time, he disavow them. *Hill* v. *Sewald*, 53 Penn. St. 271; *Dunnahoe* v. *Williams*, 24 Ark. 264; *Pike* v. *Baker*, 53 Ill. 163. In her husband's protracted absence, she may use the ordinary means to protect and to safely keep his property, and to that end she may employ counsel, and her husband would be liable for the value of his services. *Buford* v. *Speed*, 11 Bush (Ky.), 338. Her trifling gift by way of charity, though without her husband's permission, has been upheld. *Spencer* v. *Storrs*, 38 Vt. 156.

One who executes a bond secured by a mortgage on his wife's separate estate, for the benefit of a third person, is not primarily liable on the bond. The premises mortgaged are the primary fund, and he is not as tenant by the curtesy bound to discharge it. *Moore* v. *Moore*, 8 Abb. (N. Y.) App. 303; 21 How. 211. But a husband is liable as surety on his wife's promissory note, her coverture would not be a bar to a recovery against him. *McGavock* v. *Whitfield*, 45 Miss. 452.

§ 3. **Liable for wife's torts.** The husband is at common law liable to be sued jointly with his wife for all torts committed by her prior to or during coverture. *Kowing* v. *Manly*, 49 N. Y. (4 Sick.)

192; 13 Abb. (N. S.) 276; *Marshall* v. *Oakes*, 51 Me. 308; *Benjamin* v. *Bartlett*, 3 Mo. 86. If committed in his company or by his orders, he alone is liable. *Ball* v. *Bennett*, 21 Ind. 427; *McElfresh* v. *Kirkendall*, 36 Iowa, 224; *Brazil* v. *Moran*, 8 Minn. 236. That the husband did not commit the wrong in person, and was made responsible by the fact of coverture, cannot mitigate the damages. *Austin* v. *Wilson*, 4 Cush. 273. But if the husband is sued for the joint assault of husband and wife he may rebut the presumption that the wife was acting under his control, in order that the jury may measure the damages accordingly. *Miller* v. *Sweitzer*, 22 Mich. 391.

At common law husband and wife are sued together for the libel or slander of the wife; and generally for forfeiture under a penal statute (*Enders* v. *Beck*, 18 Iowa, 86; *McQueen* v. *Fulgham*, 27 Texas, 463; *Baker* v. *Young*, 44 Ill. 42); and for her assault and battery. *Griffin* v. *Reynold*, 17 How. (U. S.) 609; *Roadcap* v. *Sipe*, 6 Gratt. 213; *Tobey* v. *Smith* 15 Gray, 535. But in those States in which the "married women" act is in force, the wife is sued alone. *McCarty* v. *DeBest*, 120 Mass. 89; *Martin* v. *Robson*, 65 Ill. 129; 16 Am. Rep. 578; *Burt* v. *McBain*, 29 Mich. 260. And if he is required to be made a party as a matter of form, he is not liable for the damages recovered against the wife. Id. If the husband die before damages are recovered in the suit, the wife alone is liable. *Stroop* v. *Swarts*, 12 S. & R. 76. The husband has full management of the defense and may compromise without his wife's assent. *Coolidge* v. *Parris*, 8 Ohio St. 594.

The husband may be punished criminally for an indictable offense, not *malum in se*, committed by the wife in his presence and with his knowledge. *Hensly* v. *State*, 52 Ala. 10. It is presumed to be committed under his coercion. *State* v. *Cleaves*, 59 Me. 298; 8 Am. Rep. 422. And if he is so near to her when she is committing a crime —*e. g.*, unlawfully selling liquor—that she is under his immediate influence, his coercion will be presumed though he is not actually present. *Commonwealth* v. *Munsey*, 112 Mass. 287; *Mulvey* v. *State*, 43 Ala. 316.

By statute in various States the common law rule has been abrogated or modified. *Martin* v. *Robson*, 65 Ill. 129; 16 Am. Rep. 578; *Burt* v. *McBain*, 29 Mich. 260; *Austin* v. *Cox*, 118 Mass. 58.

In New York the husband is still liable for the personal torts of his wife, but he is not liable for her torts committed in the management and control of her separate estate. *Baum* v. *Mullen*, 47 N. Y. (2 Sick.) 577. And where husband and wife live together on premises, the separate property of the latter, the former cannot be liable for in-

juries sustained by the careless leaving of a pit uncovered thereon. *Fiske* v. *Bailey*, 51 N. Y. (6 Sick.) 150.

Insurers of buildings which are burned by the insane wife of the owner are liable for the amount of the insurance unless they can show actual design or negligence on the part of the owner. *Gove* v. *Farmers, etc., Ins. Co.*, 48 N. H. 41; 2 Am. Rep. 168.

The presumption of coercion may be rebutted. *Commonwealth* v. *Tryon*, 99 Mass. 442; *State* v. *Williams*, 65 N. C. 398; *State* v. *Potter*, 42 Vt. 495. The presumption that the wife was coerced in a murder case will be rebutted by proof that she had conspired with her husband to commit robbery. *Miller* v. *State*, 25 Wis. 384. But a wife cannot be convicted of feloniously receiving stolen goods from her husband. *Regina* v. *Brooks*, 14 E. L. & Eq. 580; *Regina* v. *Robinson*, L. R., 1 C. C. 80.

This immunity of the wife does not extend to the crimes of treason, murder or robbery, nor, in general, to those crimes, except theft, which are *mala in se*. 1 Russell on Crimes, 16.

TITLE IV.

OF THE RIGHTS OF THE WIFE.

Section 1. Right to support. See generally *infra*, 648, § 1, of preceding title. A married woman has a right, during coverture, to be reasonably supported and maintained by her husband, even though she has been decreed a *feme sole* trader. *Markley* v. *Wartman*, 9 Phil. (Penn.) 236. And she may maintain an action against a third person for enticing away and harboring her husband. *Clark* v. *Harlan*, 1 Cinc. (Ohio) 418. (*Contra*, *Van Arnam* v. *Ayers*, 67 Barb. 544.)

The fact that a man married his wife unwillingly and to secure his discharge from a bastardy proceeding and upon assurances that he would not be bound to live with her, does not, in any way, affect his duty to support her. *State* v. *Ransell*, 41 Conn. 433.

A woman who purchases goods for family use of one who knows she is married and lives with her husband cannot be made liable therefor. *Powers* v. *Russell*, 26 Mich. 179.

§ 2. **Right of dower.** Dower is the adjunct of marriage and survivorship. *Schiffer* v. *Pruden*, 64 N. Y. (19 Sick.) 47. It is the provision which the law makes for the widow out of the lands or tenements of her husband. 1 Washb. on Real Prop. 146.

The wife's right to dower is an interest in lands, contingent during the life of the husband, and attaches on the lands as soon as there is a concurrence of marriage and seizin. *Denton* v. *Nanny*, 8 Barb. 618.

Marriage is a prerequisite to this right, and in a suit for dower, if the fact of marriage is denied it must be strictly proved. *Jones* v. *Jones*, 28 Ark. 19. For that which amounts to marriage, see title 1 of this chapter. Survivorship perfects the right and makes it absolutely an estate in the widow; and recognizing the legal presumption of death arising from continued absence without being heard from, our courts sometimes allow dower, where the fact of the husband's death cannot be positively established. *Foulks* v. *Rhea*, 7 Bush (Ky.), 568.

This dower right is perfect at the death of the husband, though his ownership, beneficially, during coverture, was momentary; and the husband cannot defeat the right by any act of his, nor can the widow be deprived of it by his creditors. *Sutherland* v. *Sutherland*, 69 Ill. 481; *Smith* v. *McCarty*, 119 Mass. 519; *Rawlings* v. *Lowndes*, 34 Md. 639; *Wheatley* v. *Calhoun*, 12 Leigh, 264. But a transitory seizin of the husband, for an instant, as a conduit, is insufficient to give dower. *Cunningham* v. *Knight*, 1 Barb. 399; *Fontaine* v. *Boatmen's Saving Institution*, 57 Mo. 552; *Slaughter* v. *Culpepper*, 44 Ga. 319.

The husband must have been seized at some time during coverture, either in fact, or in law, of an estate of inheritance in the land. *Durando* v. *Durando*, 23 N. Y. (9 Smith) 331; *Atwood* v. *Atwood*, 22 Pick. (Mass.) 283; *Butler* v. *Cheatham*, 8 Bush (Ky.), 594. Generally in every case where the issue which the husband may have by his wife, by possibility may inherit, his wife shall be endowed. *House* v. *Jackson*, 50 N. Y. (5 Sick.) 161. So, a woman is dowable in all hereditaments appertaining to the realty, as well as to lands whereof her husband was seized; and this includes rents, commons, mines, if opened, and other incorporeals partaking of the realty. *Stoughton* v. *Leigh*, 1 Taunt. 402; *Coates* v. *Cheever*, 1 Cow. 460. But no title to dower attaches on joint seizin; for the mere possibility of the estate being defeated by survivorship prevents it. *Mayburry* v. *Brien*, 15 Peters (U. S.), 21. By statute in various States, abolishing the *jus accrescendi*, a joint tenant's estate is subject to dower. *Davis* v. *Logan*, 9 Dana (Ky.), 186; *Walker* v. *Walker*, 6 Coldw. (Tenn.) 571.

There may be dower in lands held at any time during coverture by the husband and others, as tenants in common. *Smith* v. *Smith*, 6 Lans. (N. Y.) 313; *Hudson* v. *Steere*, 9 R. I. 106.

The wife of the mortgagor of lands is dowable of an equity of redemption therein, existing at the death of her husband. *Harrow* v. *Johnson*, 3 Metc. (Ky.) 578; *Mills* v. *Van Voorhies*, 20 N. Y. (6 Smith) 412. She is endowed of such equity as well when a mortgage was executed before marriage by her husband *sole*, as after, when executed

jointly, as against every person, except the mortgagee and those claiming under him. *Barbour* v. *Barbour*, 46 Me. 8; *Bell* v. *Mayor, etc.*, 10 Paige, 49.

A widow as legatee by implication is entitled to dower in an estate which was devised by her husband, to be retained by the executors of the testator, subject to restrictions, for the use and benefit of her husband, during his life, and after his death to be conveyed and paid to his descendants, if there be any such then living, in the same manner as it would pass by the law of descent, if the same were to descend from him. *Johnson* v. *Jacobs*, 11 Bush (Ky.), 646.

The widow of the grantor of a deed absolute on its face, but in fact a mortgage, is entitled to dower in the premises so conveyed. *Turbeville* v. *Gibson*, 5 Heisk. (Tenn.) 565.

Where the purchase notes of land had all been paid and the vendor loaned the vendee a further sum as security, for which it was agreed that he should continue to hold the legal title, and thereafter, the vendee dying insolvent, it was held that his widow would first be entitled to have her dower befor the vendee could enforce his lien for the sum loaned (*James* v. *Fields*, 5 Heisk. [Tenn.] 395); and she would not be estopped in such a case, because in the prayer of her bill she asked to have dower only in the surplus. *Gregg* v. *Jones*, 5 id. 443.

Stock in a railroad company is real estate, in which a widow may have dower. *Copeland* v. *Copeland*, 7 Bush (Ky.). 349. But a widow would not be entitled to dower in lands held by her deceased husband under a void parol contract. *Lane* v. *Courtney*, 1 Heisk. (Tenn.) 331.

The wife's right, both inchoate and vested, in the husband's land follows the surplus moneys, and will be protected against creditors of the husband, and her one-third will be directed to be invested for her. *Vartie* v. *Underwood*, 18 Barb. 564; *Bank of Commerce* v. *Owens*, 31 Md. 320; 1 Am. Rep. 60.

There can be no dower in a reversion in fee, or a vested remainder, expectant upon an estate for life. *Durando* v. *Durando*, 23 N. Y. (9 Smith) 331; *Wilmarth* v. *Bridges*, 113 Mass. 407. But where the husband is seized of a vested remainder expectant upon a life estate, subject to be defeated by his own death prior to that of the tenant for life, and he purchases the life estate, this is such a seizin as gives the wife dower subject to be defeated as above. *House* v. *Jackson*, 50 N. Y. (5 Sick.) 161.

The widow of the vendee is not entitled, as against the vendor in a foreclosure proceeding, for the purchase-money, to dower in land purchased during coverture. *Birnie* v. *Main*, 29 Ark. 591; *Duke* v.

Brandt, 51 Mo. 221; *Walton* v. *Hargroves*, 42 Miss. 18. If a vendee, before he makes full payment and is able to enforce a conveyance of the land, assigns his contract, and the assignee completes the payment and obtains a deed, the widow of the first purchaser will acquire no right of dower in the premises. *Morse* v. *Thorsell*, 78 Ill. 600.

There can be no dower in real estate held as partnership assets. *Hiscock* v. *Jaycox*, 12; Bank. Reg. 507. But the widow of a deceased partner is entitled to dower in a moiety of partnership lands held by two in common. *Duhring* v. *Duhring*, 20 Mo. 174; *Smith* v. *Smith*, 5 Ves. 189; *Hawley* v. *James*, 5 Paige, 451.

There can be no dower in the equity of redemption of a mortgage executed by the husband before the marriage (*Burson* v. *Dow*, 65 Ill. 146); or in lands acquired by the husband subsequent to a judgment decreeing a divorce in favor of the wife, on the ground of the husband's adultery (*Kade* v. *Lauber*, 48 How. [N. Y.] 382; 16 Abb. [N. S.] 288); or in lands levied on and sold under execution against the husband, more than two years prior to his death, although he died vested with the legal title, the sheriff having failed to make a deed to the purchaser (*Rose* v. *Rose*, 6 Heisk. [Tenn.] 533; overruling S. C., 4 Coldw. 377); or as against one who claims a quit-claim deed from the husband, possessing no title except what he derived from an assignment to himself of a mortgage on the lands. *Toomey* v. *McLean*, 105 Mass. 122.

Where a land warrant issued from the United States to a soldier for services in the war of 1812, and the patent therefor was made out in his name, but after his death, his wife would have dower. *Johnson* v. *Parcels*, 48 Mo. 549. And where a deed is set aside as fraudulent, at the instance of the creditors, the widow will have her dower as against the creditors, or purchasers under a mere decretal sale. *Dugan* v. *Massey*, 6 Bush (Ky.), 181. And a widow is entitled, in equity, to dower of all lands purchased by her, as administratrix of the estate of her husband, out of the proceeds of the sale of slaves, of which he died seized, to an amount equal to her unassigned dower. *Haynes* v. *Bessellieu*, 25 Ark. 499.

A widow has no dower in grass and fruits, and other spontaneous productions of the soil, growing on her husband's lands at the time of his decease. *Kain* v. *Fisher*, 6 N. Y (2 Seld.) 597.

A statute in derogation of a widow's common law right will be construed liberally to protect her fully in such right. *Hinds* v. *Pugh*, 48 Miss. 268. But her right of dower in the land of her husband, the time and manner of assigning and the causes that may defeat her dower, are all determined by the laws of the State in which the lands

are situated (*Apperson* v. *Bolton*, 29 Ark. 418); and by the law in force at the time of the husband's death, and not that which was in force during the marriage, or may have been during its continuance. *Ware* v. *Owens*, 42 Ala. 212.

An ante-nuptial contract of a woman that she will not claim her dower in the event of her intended marriage is contrary to public policy, and unless founded upon the consideration of some provision for her in lieu of dower, will be ineffectual both at law and in equity. *Curry* v. *Curry*, 10 Hun (N. Y.), 366. But a post-nuptial agreement whereby the wife agrees to release her dower in consideration of $70 per annum, to be paid her by her husband during his life, will be sustained in equity. *Foster* v. *Foster*, 5 id. 557.

A testator cannot create a charge upon the dower of his widow, where she takes nothing under the will. *Mowbry* v. *Mowbry*, 64 Ill. 383. But her dower interest can be taken on execution for her own debts before her dower has been assigned. *Greathead's Appeal*, 42 Conn. 374; *Davison* v. *Whittlesey*, 1 Mac Arthur, 163.

Proceeds derived by the widow from the sale of her dower right are her absolute property. *Pickey* v. *Culbertson*, 50 Mo. 341. But buildings erected on a dower estate by the dowress, designed as additions to the freehold, pass to the remaindermen. *Cannon* v. *Hare*, 1 Tenn. Ch. 22.

An inchoate right of dower is not the subject of conveyance in any of the usual forms by which real property is transferred; and the law will not effect indirectly, or by way of estoppel, that which cannot be accomplished by contract and the ordinary forms of conveyance. *Marvin* v. *Smith*, 46 N. Y. (1 Sick.) 571. And lands assigned the widow as dower, after her right became perfect, are not subject to partition or sale in an action by the heirs for that purpose. *Clark* v. *Richardson*, 32 Iowa, 399. A widow's dower before assignment is merely a right in action. *Rayner* v. *Lee*, 20 Mich. 384. And after assignment it is subjected to the charges, duties and services to which the estate may be liable, in proportion to the interest therein. *Peyton* v. *Jeffries*, 50 Ill. 143.

A wife who joins with her husband in a conveyance of lands thereby releases and extinguishes her right of dower therein, not only as to the grantee and his successors but also as to third parties. *Elmendorf* v. *Lockwood*, 57 N. Y. (12 Sick.) 322; affirming S. C., 4 Lans. 393.

Where a testator makes a provision for his wife, and proceeds to dispose of all the remainder of his property, it will be presumed that the provision was intended in lieu of dower. *Apperson* v. *Bolton*, 29 Ark. 418. And a widow may elect between such provisions and her

dower; if she renounce the will, she takes as if her husband died intestate. *Hoover* v. *Landis*, 76 Penn. St. 354. But she is not put to her election unless it clearly appears from the will that such provision was intended in lieu of dower. *Alling* v. *Chatfield*, 42 Conn. 276; *Metteer* v. *Wiley*, 34 Iowa, 214; *Vernon* v. *Vernon*, 53 N. Y. (8 Sick.) 351. If the widow concludes to accept the provisions of the will, they must be permitted to have the effect prescribed by the will. *Collins* v. *Woods*, 63 Ill. 285. And if she make her election of the provisions of the will, or of an ante-nuptial contract in lieu of dower, under a misapprehension of the facts, she may rescind and take her dower. *Dabney* v. *Bailey*, 42 Ga. 521; *Camden Mut. Ins. Co.* v. *Jones*, 23 N. J. Eq. 171; *Richart* v. *Richart*, 30 Iowa, 465. Devisees prejudiced by the widow's election of dower are equitably entitled to compensation out of the rejected portion of the will. *Jennings* v. *Jennings*, 21 Ohio St. 56. The provision that the widow accepts in lieu of her dower is liable for its proportion of the debts of the testator. *Bray* v. *Mill*, 21 N. J. Eq. 343.

Dower may be defeated, released or barred by the wife's own acts in the way of estoppel (*Nelson* v. *Holly*, 50 Ala. 3; *Farrow* v. *Farrow*, 1 Del. Ch. 457; *Elmendorf* v. *Lockwood*, 57 N. Y. [12 Sick.] 322; S. C., 4 Lans. 393); by her jointure (*Yancy* v. *Smith*, 2 Metc. [Ky.] 408); by a valid sale and conveyance of land for non-payment of taxes (*Jones* v. *Devore*, 8 Ohio [N. S.], 430); by the exercise of the right of eminent domain (*Moore* v. *New York*, 8 N. Y. [4 Seld.] 110); by a decree of divorce for the wife's adultery (*Schiffer* v. *Pruden*, 64 N. Y. [19 Sick.] 47), under the New York statute. In the old English statute, her adultery without reconciliation would bar her dower. In the various States the statutes differ upon this point *Gould* v. *Crow*, 57 Mo. 200; *Calame* v. *Calame*, 24 N. J. Eq. 440; *Gleason* v. *Emerson*, 51 N. H. 405.

But the acceptance by the widow of the bequest of a life estate in her husband's lands does not bar her right of dower (*McGuire* v. *Brown*, 41 Iowa, 650); nor is she deprived of her right of dower as against a subsequent purchaser at a sheriff's sale without notice, by the neglect of her husband to record his deeds (*Pickett* v. *Lyles*, 5 S. C. 275); nor by the purchase by a railroad corporation of lands without the limits of the road. *Nye* v. *Taunton Branch R. R. Co.*, 113 Mass. 277.

§ 3. **Administration.** On the death of the husband, at common law, the widow is usually selected to administer upon his estate. But administration may be granted to the widow or to the next of kin, or both, at discretion. *Fawtry* v. *Fawtry*, 1 Salk. 36; *Case of Williams*,

3 Hagg. Ecc. 217. And by statute in the various States the English rule is followed, and commonly the widow is preferred. 2 N. Y. R. S. 76, § 27; *Gyger's Appeal*, 65 Penn. St. 311; *Lynch* v. *Lively*, 32 Ga. 575.

The widow may associate a stranger with her in the administration (*Phillips* v. *Green*, 4 Heisk. [Tenn.] 350); and when she consents so to do, she cannot revoke her consent. *Williams' Case*, 1 Tuck. (N. Y.) 8. But a widow in order to administer must apply within a reasonable time for letters. *Jinkins* v. *Sapp*, 3 Jones' Law (N. C.), 510. A widow under 21 years of age cannot be appointed administratrix. *Wallis* v. *Wallis*, 1 Wins. (N. C.) No. 1, 78.

The widow is entitled to administer although the marriage might have been dissolved in the life-time of her husband. *Parker's Appeal*, 44 Penn. St. (8 Wright) 309; *White* v. *Lowe*, 1 Redf. (N. Y.) 376. But not if the marriage were absolutely void. *O'Gara* v. *Eisenlohr*, 38 N. Y. (11 Tiff.) 296. Where a decree of divorce was annulled and vacated after the husband's death, the widow was entitled to administer. *Boyd's Appeal*, 38 Penn. St. 246.

Neither the fact of separation by mutual consent between husband and wife, nor her inability to read or write, disqualifies her from acting as administratrix of the husband's estate. *Nusz* v. *Grove*, 27 Md. 391; *Read* v. *Howe*, 13 Iowa (5 With.), 50; *Goods of Ihler*, L. R., 3 P. & D. 50.

§ 4. **Separate estate.** As we have seen, *ante*, 637, 643, §§ 3 and 4 of title 2, in this chapter, the wife at common law could hold no property independent of her husband. But in equity, through the medium of a trustee, she is allowed to enjoy property as freely as a *feme sole*, however it may have been acquired, whether through an ante-nuptial contract with her husband, or by gift from him, or from a stranger, independent of such contract. *McChesney* v. *Brown*, 25 Gratt. (Va.) 393; *Phillips* v. *Wooster*, 36 N. Y. (9 Tiff.) 412; *Hart* v. *Robertson*, 21 Cal. 346. And the husband will be held, if necessary, as the trustee to support it. *McKennan* v. *Phillips*, 6 Whart. 571; *Tullett* v. *Armstrong*, 1 Beav. 21; *Davison* v. *Atkinson*, 5 T. R. 435; *Porter* v. *Bank of Rutland*, 19 Vt. (4 Washb.) 410.

But it is certainly to be preferred on many accounts that a person other than the husband should be the trustee for the wife. *Newland* v. *Paynter*, 4 M. & Cr. 408; S. C., 10 Sim. 377; *Wall* v. *Rogers*, L. R., 9 Eq. 58; *Humphrey* v. *Richards*, 25 L. J. Eq. 444. And she may hold without the intervention of a trustee. *Holthaus* v. *Hornbostle*, 60 Mo. 439; *Vance* v. *Nogle*, 70 Penn. St. 176; *Chew* v. *Beall*, 13 Md. 348.

As at law the property of the wife, whether acquired prior to or during coverture, vests in the husband by virtue of his marital right, it is necessary that the intention to establish a separate use in the wife should be clearly indicated, in order that equity may support it. *Short* v. *Battle*, 52 Ala. 456; *Buck* v. *Wroten*, 24 Gratt. (Va.) 250; *Hayt* v. *Parks*, 39 Conn. 357; *Kensington* v. *Dollond*, 2 M. & K. 184. But no particular phraseology is necessary to create the separate estate. *Prout* v. *Roby*, 15 Wall. 471; *Boal* v. *Morgner*, 46 Mo. 48; *Tyler* v. *Lake*, 2 Russ. & M. 188. If a plain intent to exclude the husband appear it is enough. *Charles* v. *Coker*, 2 S. C. 122; *Walton* v. *Broaddus*, 6 Bush (Ky.), 328; *Moore* v. *Morris*, 4 Drew, 37. And this intent must appear on the instrument that creates the estate. *Quigley* v. *Graham*, 18 Ohio St. 42. And the mere intervention of a trustee may be sufficient. *Gaines* v. *Poor*, 3 Metc. (Ky.) 503; *Taylor* v. *Stone*, 13 S. & M. 653. The intention of excluding the husband's marital rights may be inferred from the nature of the provisions attached to the gift. *Prichard* v. *Ames*, Turn. & Russ. 223.

Among the varied forms of expression which, of themselves, have been held to indicate a separate use are the following: to her sole and separate use (*Buchanan* v. *Turner*, 26 Md. 1; *Parker* v. *Brooke*, 9 Ves. 583; *Adamson* v. *Armitage*, 19 id. 415); for her sole and separate use free from the debts of her husband (*Sprague* v. *Tyson*, 44 Ala. 338); for her own use independent of any husband (*Wagstaff* v. *Smith*, 9 Ves. 520); not subjected to the control of her husband (*Bain* v. *Lescher*, 11 Sim. 397); for her sole use (*Lindsell* v. *Thacker*, 12 Sim. 178); for her own use and benefit independent of any other person *Margetts* v. *Barringer*, 7 Sim. 482); for her own sole use, benefit and disposition (*Ex parte Ray*, 1 Madd. 199); to her and to her bodily heirs, to their exclusive use, benefit and behoof (*Williams* v. *Avery*, 38 Ala. 115); to have and enjoy the use and possession of and on her death to convey to her heirs (*Smith* v. *Henry*, 35 Miss. [6 Geo.] 369); for her sole use and benefit (———v. *Lyne*, Younge, 562); for her full and sole use and benefit (*Arthur* v. *Arthur*, 11 Ir. Ch. 513); for her sole use and benefit (*Ex parte Killick*, 3 Mon. D. & DeG. 480); to and for her only use and benefit (*Cuthbert* v. *Wolfe*, 19 Ala. 373); for her sole and separate use and benefit (*Archer* v. *Rorke*, 7 Ir. Eq. 478); for her own proper use and benefit (*Griffith* v. *Griffith*, 5 B. Monr. 113; *Warren* v. *Haley*, 1 S. & M. Ch. 647); I give you the negro girl, M., and you must keep her and let nobody take her from you, until I call for her, and after ninety-nine years I will call for her and you must give her up (*Whitten* v. *Jenkins*, 34 Ga. 297); for her use (*Steel* v. *Steel*, 1 Ired. Eq. 452; *Good* v. *Harris*, 2 Ired. Eq. 630);

for her own use and at her disposal (*Prichard* v. *Ames*, Turn. & Russ. 222); for her livelihood (*Darley* v. *Darley*, 3 Atk. 399); for her entire use, benefit, profit, and advantage (*Heathman* v. *Hall*, 3 Ired. Eq. 414); to pay the income to her, for and during the joint lives of herself and husband (*Charles* v. *Coker*, 2 S. C. 122); to pay the interest and profits to her, and the principal to her or to her order by note, or writing under her hand. *Hulme* v. *Tenant*, 1 Bro. C. C. 16.

But the expression "to her and not to be subject to the debts of the husband," will not be sufficient (*Lewis* v. *Elrod*, 38 Ala. 17); and so, the expression "to her only proper use and behoof forever." *Tyson* v. *Mattair*, 8 Fla. 107; *Toombs* v. *Stone*, 2 Metc. (Ky.) 520. The words "own" and "proper" are not of like efficacy with the word "sole" to create a separate estate. *Tyler* v. *Lake*, 2 Russ. & M. 187; *Johnes* v. *Lockhart*, 3 Bro. C. C. 383, *n.*; *Hartley* v. *Hurle*, 5 Ves. 545. The word "enjoy" is strong to indicate the intent to establish a separate use. *Tyrrell* v. *Hope*, 2 Atk. 558.

An ante-nuptual parol agreement by the husband that the wife's property should remain hers after marriage creates in her, as to it, a separate estate. *Child* v. *Pearl*, 43 Vt. 224. But the marital rights of the husband in his wife's real estate cannot be alienated or defeated merely by his permitting her to hold and enjoy the property and collect and apply the rents, issues and profits to her own use; nor can the wife in that way acquire a separate property in such estate. *Schafroth* v. *Ambs*, 46 Mo. 114, 580.

A gift of the produce of a fund to a married woman will be deemed a gift of the fund itself, if no contrary intention appears. *Troutbeck* v. *Boughey*, L. R., 2 Eq. 534; *Haig* v. *Swiney*, 1 Sim. & Stu. 487; *Simons* v. *Horwood*, 1 Keen, 7.

The savings of the issues, incomes, interest and profits of a married woman's separate estate are as much her separate property as is the principal, unless she permit them to pass under the marital control of her husband. *Merritt* v. *Lyon*, 3 Barb. 110; *Kee* v. *Vasser*, 2 Ired. Eq. 553; *Hoot* v. *Sorrel*, 11 Ala. 386.

The *jus disponendi* is an incident to the separate estate of a married woman, unless the power of alienation is restrained by the instrument creating the estate. *Burnett* v. *Hawfe*, 25 Gratt. (Va.) 482; *Morrison* v. *Solomon*, 52 Ga. 205; *Re Kinkead*, 3 Biss. (Ill.) 405. She may dispose of the estate without the solemnity of an acknowledgment or private examination. *Albany Fire Ins. Co.* v. *Bay*, 4 N. Y. (4 Comst.) 9; *Harris* v. *Harris*, 7 Ired. Eq. 111.

The independent legislation of the majority of our States has superseded, in a great degree, the jurisdiction of chancery and has made the

separate estate of married women recognizable at law. Following — sometimes at a distance — the rules of equity as laid down by the English courts, each State by its own "married women's act" has established a law that cannot always be reconciled with the legislation of its sister communities. And this lack of uniformity produces discords in the decisions, and no consistent and uniform American doctrine can result therefrom. To analyze each of the "married women's acts," with the proper illustrative cases, would be a task at once unprofitable and greatly in excess of the space allotted to this subject.

§ 5. **Separate earnings — right to trade.** It is a well-settled principle of law and of equity, that the services and earnings of a married woman belong, in the first instance, to her husband. *National Bank of Metropolis* v. *Sprague*, 5 C. E. Green (N. J.), 13; *Yopst* v. *Yopst*, 51 Ind. 61. But by statute, in many States, married women are allowed the benefits of their personal services, when performed on their sole and separate account; and they may apply their separate earnings as they see fit without the intervention or control of their respective husbands. And even on general principles of equity, the husband may in this country as in England create in his wife a separate estate in the products of her own toil; as against creditors the validity of this gift would be subject to the same rules that apply to other voluntary conveyances. *Barron* v. *Barron*, 24 Vt. 375; *Smart* v. *Comstock*, 24 Barb. 411; *Pinkston* v. *McLemore*, 31 Ala. 308.

A contract between the guardian of an insane husband and the wife, that the latter shall care for the husband and receive a certain sum for her services, is without consideration and void; she owes the services independent of any contract. *Grant* v. *Green*, 41 Iowa, 88. And where husband and wife were living together, with her mother, and for a period before her death the wife took care of her, in the absence of any evidence of a contrary intention it would be presumed that she rendered the services in behalf of her husband. *Morgan* v. *Bolles*, 36 Conn. 175.

Statutes which authorize married women to hold property, by gift, grant, purchase or devise from any person other than the husband do not generally, by implication, carry the wife's earnings. *Ryder* v. *Hulse*, 24 N. Y. (10 Smith) 372; affirming S. C., 33 Barb. 264; *Mitchell* v. *Seitz*, 1 MacArthur, 480; *Hoyt* v. *White*, 46 N. H. 45; *McCluskey* v. *Provident Inst.*, 103 Mass. 300.

The husband, in pursuance of an ante-nuptial or a post-nuptial contract, may confer upon his wife the right to trade for her exclusive benefit. *Wierman* v. *Anderson*, 42 Penn. St. 311; *Richardson* v. *Estate of Merrill*, 32 Vt. 27; *Uhrig* v. *Horstruan*, 8 Bush (Ky.), 172. If the

contract be before marriage it will bind the husband and his creditors also; if after, the husband alone is bound. *Lavie* v. *Phillips*, 3 Burr. 1783. If the property is vested in the trustees before marriage the wife will be considered as their agent in the business. *Jarman* v. *Woolloton*, 3 T. R. 618. If the business be carried on jointly with the husband, the stock in trade will be subject to the husband's obligations. *Barlow* v. *Bishop*, 1 East, 432. And the partnership may be adjudged bankrupt. *Re Kinkead*, 3 Biss. (Ill.) 405. If unconnected with her separate estate she carry on a partnership business assisted by her husband, he, and not she, is to be regarded *in law* as the partner. *Swasey* v. *Antram*, 24 Ohio St. 87. And the husband will be liable for the debts of the business, if it appear that he participated in the benefits. *Petty* v. *Anderson*, 2 Carr. & P. 38.

The separate estate of a married woman trading as a *feme sole* under the authority of a deed conferring that right upon her, may be subjected by a court of equity to the payment of her debts. *Hackett* v. *Metcalfe*, 6 Bush (Ky.), 352; *Penn* v. *Whitehead*, 17 Gratt. (Va.) 503; *Partridge* v. *Stocker*, 36 Vt. 108. In the last case the wife's stock in trade resulting from her credit, and her earnings with her husband's consent, was treated as her separate property. In Indiana the fact that credit for goods sold to a married woman is given to her upon the faith of her separate estate is not sufficient to create a charge against it. She must herself intend to contract in regard to her separate property. *Kantrowitz* v. *Prather*, 31 Ind. 92.

By legislation in many States the wife's right to trade on her own account is enlarged and more fully established. Earlier American decisions have regarded, with little favor, the right of a woman, living with her husband, to carry on a trade on her own account where it does not subject her stock in trade to the debts of her husband. *Mackinley* v. *McGregor*, 3 Whart. 378, *and cases there cited.* In Delaware this right is ignored. *Godfrey* v. *Brooks*, 5 Harring. 396. And in North Carolina it is expressly repudiated. *McKinnoan* v. *McDonald*, 4 Jones' Eq. 1.

§ 6. **To make a will.** At common law a married woman could not make a valid will. But there are exceptions to this rule. As, by the English law, a wife could make a valid will of personalty by the consent of her husband. *Grimke* v. *Grimke*, 1 Dessau. 366. But this is upon the condition that the husband survive the wife, and do not elect, after her death, to disaffirm the consent thus given. *Tucker* v. *Inman*, 4 M. & G. 1049; *Ex parte Fane*, 16 Sim. 406. The wife's right to dispose of her property by will is founded upon the husband's waiver of his own right to administer for his own benefit. *Stevens* v.

Bagwell, 15 Ves. 156. His consent to the particular will does not pass subsequently-acquired property. *Stevens* v. *Bagwell*, 15 Ves. 156; *Price* v. *Parker*, 16 Sim. 198. His consent may be shown by his drawing her will. *Smelie* v. *Reynolds*, 2 Dessaus. 63. If the wife be executrix, and as such entitled to the possession of personal chattels, not yet reduced into possession, she may dispose of the same by will, without the assent of the husband; not so if she had reduced such chattels into possession. *Tucker* v. *Inman*, 4 M. & G. 1049; *Scammell* v. *Wilkinson*, 2 East, 552. So, too, if the chattels come to the separate use of the wife, during coverture, or are secured to her independent and separate use, she may dispose of the same by will during coverture. *Fettiplace* v. *Gorges*, 1 Ves. Jr. 46. So, too, she may make a will during coverture, where by any sufficient instrument executed by husband and wife before coverture she retains the power to dispose of her estate, both real and personal. *Hodsden* v. *Lloyd*, 2 Bro. C. C. 534.

When the husband is *civiliter mortuus* the wife may make her will and dispose of her estate both real and personal, as if he were dead. *Countess of Portland* v. *Prodgers*, 2 Vern. 104; *Newsome* v. *Bowyer*, 3 P. Wms. 37.

Where the consent of the husband is needed it must be shown that he gave his consent to this particular will. His general assent will not be sufficient. *Rex* v. *Bettesworth*, 2 Strange, 891; *Kurtz* v. *Saylor*, 20 Penn. St. 215. He may revoke his consent at any time before the probate of the will. *Anonymous*, 1 Mod. 211; *Brook* v. *Turner*, 2 id. 170; *Van Winkle* v. *Schoonmaker*, 15 N. J. Ch. 384. After probate of the will he cannot revoke his consent. *George* v. *Bussing*, 15 B. Monr. 558; *Fisher* v. *Kimball*, 17 Vt. 323; *Cutter* v. *Butler*, 5 Fost. (N. H.) 343. Nor can he revoke his consent if by any acts he has induced the executor to act under the instrument. *Maas* v. *Sheffield*, 10 Jur. 417; S. C., 1 Rob. Ecc. 364; *Brooks* v. *Turner*, *supra*.

§ 7. **Contracts or suits with husband.** At common law the unity of husband and wife is regarded as such that neither can make a valid contract with the other, nor can one sue the other. In equity the rule is different, and husband and wife are deemed, as respects property, to occupy toward each other distinct relations, and the husband may come under obligations of debt to the wife the same as a stranger. *Kaufman* v. *Whitney*, 50 Miss. 103; *Rowland* v. *Plummer*, 50 Ala. 182; *Monroe* v. *May*, 9 Kan. 466. And whenever a contract would be good at law if made by a husband with trustees for his wife, it will be sustained in equity without the intervention of a

trustee. *Sims* v. *Ricketts*, 35 Ind. 181; 9 Am. Rep. 679; *Tennison* v. *Tennison*, 46 Mo. 77.

Where husband and wife held lands in equal parts, and it was agreed that the husband should purchase the wife's half at a stipulated price, a part of which he paid and to secure the balance, through a trustee took the title, and gave to him a note with a mortgage on the premises to secure its payment, and the trustee afterward transferred the note and mortgage to the wife's attorney for collection, the claim could not be enforced in equity against the land of the husband previously acquired, but it would be enforced against the half conveyed to him by the trustee. The note and mortgage amounted to no more than an unexecuted voluntary promise by the husband to give the wife that sum of money. *Grove* v. *Jeager*, 60 Ill. 249. The meritorious consideration arising out of the husband's duty to support his wife is not sufficient in equity to sustain a promissory note given by the husband to the wife as against the collateral heirs of the former. *Whitaker* v. *Whitaker*, 52 N. Y. (7 Sick.) 368; 11 Am. Rep. 711.

Executed contracts, if made in good faith between husband and wife, are valid. *Sweeney* v. *Damron*, 47 Ill. 450.

Where a wife sacrificed her income in order to loan her husband money that he might make improvements on real estate which he promised to convey to her, she is entitled to a decree of specific performance. *Hixon* v. *Cuppy*, 33 Ind. 210. Articles of furniture purchased by the husband in pursuance of an antecedent agreement with his wife, that he should advance the money and she would reimburse him, which she afterward did out of her separate estate, are her separate property. *Myers* v. *King*, 42 Md. 65.

In equity, a married woman may recover from a firm, of which her husband is a member, a debt which accrued to her before marriage, her husband having settled her estate upon her by marriage settlement. *Bennett* v. *Winfield*, 4 Heisk. (Tenn.) 440.

A widow cannot recover, from the estate of her deceased husband, moneys constituting part of her separate estate, which she had loaned him during coverture, unless there was an express promise or agreement on the part of the husband to repay the same. *Hill* v. *Hill*, 38 Md. 183. And in Oregon a divorced wife cannot maintain an action at law, against her divorced husband, upon an implied contract arising during coverture. *Pittman* v. *Pittman*, 4 Oreg. 298.

In Texas a post-nuptial contract will only be enforced when equitable in its terms, and its observance is demanded by the clearest princiciples of justice. *Ximines* v. *Smith*, 39 Tex. 49. And in Massachu-

setts, no contract between husband and wife for the payment of money has any validity. *Bassett* v. *Bassett*, 112 Mass. 99.

§ 8. **Settlements.** Equity, it is generally considered in this country, as in England, will enforce the specific performance of a *bona fide* ante-nuptial agreement, if the intention of the parties is consistent with the principles and the policy of the law. *Hunter* v. *Bryant*, 2 Wheat. 33; *Stilley* v. *Folger*, 14 Ohio, 610; *Albert* v. *Winn*, 5 Md. 66. And it will be liberally construed so as to carry into effect the intention of the parties. *Ardis* v. *Printup*, 39 Ga. 648; *Trevor* v. *Trevor*, 1 P. Wms. 631; *Blandford* v. *Marlborough*, 2 Atk. 545. If, from the circumstances or the instrument, it appears that the collateral relatives, in a given event, should take the estate, and there be a proper imitation to that effect, a court of equity will enforce the trust for their benefit. *Neves* v. *Scott*, 9 How. (U. S.) 196, 210; S. C., 13 How. 268; *Parsons* v. *Ely*, 45 Ill. 232; *Eaton* v. *Tillinghast*, 4 R. I. 276.

A man's oral agreement with his intended wife to make a settlement upon her is not binding as an ante-nuptial contract (*Chambers* v. *Sallie*, 29 Ark. 407; *Flenner* v. *Flenner*, 29 Ind. 564); nor is it binding if made after marriage. *Lloyd* v. *Fulton*, 91 U. S. (1 Otto) 479; *Bradley* v. *Saddler*, 54 Ga. 681. But an ante-nuptial oral agreement followed by marriage and by acts continually recognizing the agreement will be sufficient as between the parties and those claiming under them. *Southerland* v. *Southerland*, 5 Bush (Ky.), 591; *Child* v. *Pearl*, 43 Vt. 224.

The utmost good faith is required between parties to ante-nuptial contracts, and if the provision secured to the wife be unreasonably disproportionate to the means of the intended husband, it raises the presumption of designed concealment, and throws upon himself the burden of disproof. *Kline's Estate*, 64 Penn. St. 122; *Ex parte McBurnie*, 1 DeG. M. & G. 446; *Ramsay* v. *Richardson*, Riley's Ch. 271. Mere indebtedness of the husband, at the time of making the settlement upon his wife, will not alone make the settlement void; it must also appear that the husband was insolvent, or that the settlement had a direct tendency to impair the rights of creditors. *Patrick* v. *Patrick*, 77 Ill. 555; *Lloyd* v. *Fulton*, 91 U. S. (1 Otto) 479; *Kehr* v. *Smith*, 20 Wall. 31. If it appear that the settlement is part of a scheme to defraud and delay creditors, it will be set aside as against the just claims of the latter. *Columbine* v. *Penhall*, 1 Sm. & Giff. 228; *Goldsmith* v. *Russell*, 5 DeG. M. & G. 555; *Simpson* v. *Graves*, Riley's Ch. 232.

Where the property of the intended wife is conveyed by ante-nuptial settlement to a trustee for her sole and separate use and benefit during the coverture, and not to be subject to the debts or contracts of the

husband, the property is held under the provisions of the deed and not under the statutes governing the separate estate of married women. *Braune* v. *McGee*, 50 Ala. 359. And under such settlement the profits and incomes accruing from the property belong exclusively to the wife and do not become a part of the *corpus* of the trust fund in which a remainder may have been created, unless some provision is made therefor. *Artope* v. *Goodall*, 53 Ga. 318; *Ordway* v. *Bright*, 7 Heisk. (Tenn.) 681.

Where an unmarried woman conveyed all her property in trust to sell, re-invest, and pay the income to herself or her appointee during life, and in case of her marriage, free from the debts and control of her husband, her estate in the property is but a life estate and the trust would continue though she survived her husband. *Ashurst's Appeal*, 77 Penn. St. 464. But where *a married woman, and her husband*, conveyed her real estate to a trustee to be sold, the proceeds to be applied to her sole and separate use, reserving the right to dispose of her property by will, and directing that in default of a will it should go to her heirs, the trust has reference only to coverture and determines on the death of her husband. *Hepburn's Appeal*, 65 Penn. St. 468.

When a man in contemplation of marriage agrees to make a settlement on his wife in consideration of which she agrees to relinquish her right in his property at his decease, and he fails to make the settlement, the widow is not barred of any right which she might have asserted if no such agreement had been made. *Pierce* v. *Pierce*, 9 Hun (N. Y.), 50.

Equity requires no particular form or expression of words to make a valid marriage settlement. It is merely required that there should be an intent to benefit and a person to be benefited. An agreement will be binding between husband and wife without the intervention of a trustee, if it possess the other requirements. *Logan* v. *Goodall*, 42 Ga. 95. But if by ante-nuptial contract the husband be appointed trustee of real and personal property, to be taken by the wife on attaining a certain age, under a will, to have the entire and sole management, direction and control thereof, and no beneficiary is named in the instrument, nor any purpose to which the rents and profits are to be applied, there will be no trust created which a court can execute. *Dillaye* v. *Greenough*, 45 N. Y. (6 Hand) 438.

When a man in contemplation of marriage agrees to make a settlement on his wife, in consideration whereof she agrees to relinquish her rights in his property at his decease, and he fails to make the settlement, the widow is not barred of any right which she might have asserted if no such agreement had been made. *Pierce* v. *Pierce*, 9

Hun (N. Y.), 50. *Sheldon* v. *Bliss*, 8 N.Y. (4 Seld.) 31; *Woodward* v. *Woodward*, 5 Sneed, 49; *Vance* v. *Vance*, 21 Me. 364.

Although an ante-nuptial settlement vesting a freehold estate in the wife upon the marriage cannot operate as a feoffment at common law, yet the instrument will operate as a covenant to stand seized to the use of the person named, and a court of equity will secure the wife in the enjoyment of such estate as passes under the deed. *Caulk* v. *Fox*, 13 Fla. 148.

Where an ante-nuptial settlement conveyed to a trustee an estate for life of the wife, and it left to her the reversion in fee, her subsequent deed in which her husband and the trustee joined, passed the fee, and left no estate for her heirs to take under the settlement. *Woods* v. *Richardson*, 117 Mass. 276.

The *jus mariti* in an estate conveyed to a woman cannot be excluded without a clear and unequivocal expression of such intent in the deed. *Paul* v. *Leavitt*, 53 Mo. 595; *Wade* v. *Cantrell*, 1 Head, 346.

But a voluntary valid settlement once made, unless the instrument itself expresses a power of revocation, cannot be revoked at the wish of the settler, although the trustee was her confidential adviser. *Falk* v. *Turner*, 101 Mass. 494. But if in a settlement made by a wife with the consent of her husband, the power of revocation be omitted by mistake of the scrivener, and the wife survive the husband who dies without issue of their marriage, the trustees will be decreed to reconvey the property to the wife. *Russell's Appeal*, 75 Penn. St. 269.

An ante-nuptial settlement by which the wife's estate is conveyed to trustees for her separate use, does not relieve the husband from the legal obligation to discharge the wife's debts, contracted prior to the marriage, if the claim be asserted, and a recovery thereon had during the existence of the coverture. *Powell* v. *Manson*, 22 Gratt. (Va.) 177.

A settlement after marriage in pursuance of a *parol* agreement entered into before marriage is void; but if made in pursuance of an ante-nuptial written agreement, it is valid. *Reade* v. *Livingston*, 3 Johns. Ch. 481; *Thomson* v. *Dougherty*, 12 Serg. & Rawle, 448; *Magniac* v. *Thompson*, 1 Bald. C. C. (U. S.) 344. A voluntary settlement after marriage, by a person indebted at the time, is fraudulent and void against such antecedent creditors. *Borst* v. *Corey*, 16 Barb. 136; 15 N. Y. (1 Smith) 505; *Kinnard* v. *Daniel*, 13 B. Monr. (Ky.) 496; *Wray's Trusts*, 15 E. L. & Eq. 265. And subsequent creditors, in order to defeat the settlement, need not show that he was absolutely insolvent at the time; but they must show that there was sufficient antecedent indebtedness to afford reasonable evidence of an intent to defraud. *Read* v. *Livingston*, 3 Johns. Ch. 481; *Richardson* v. *Small-*

wood, Jac. 552; *Walker* v. *Burrows*, 1 Atk. 93. When the deed of settlement is once set aside the property is thrown open to all the creditors. *Ede* v. *Knowles*, 2 Y. & Col. C. C. 178; *Kidney* v. *Coussmaker*, 12 Ves. 136; *Jenkyn* v. *Vaughan*, 3 Drew, 419.

If the person be not indebted at the time, a post-nuptial voluntary settlement upon the wife or children, if made without any fraudulent intent, is valid against subsequent creditors. *Sexton* v. *Wheaton*, 8 Wheat. 229; *Jewell* v. *Porter*, 11 Foster, 34; *Bridgford* v. *Riddell*, 55 Ill. 261.

A post-nuptial settlement may be good as against existing creditors of the husband, if made upon a valuable consideration. As where the wife pays the husband's debts from her separate earnings, pursuant to a *parol* ante-nuptial agreement. *Dygert* v. *Remerschneider*, 39 Barb. 417; 32 N. Y. (5 Tiff.) 629. Where the husband conveys land to his wife for a valuable consideration paid out of her separate estate. *Simmons* v. *McElwain*, 26 Barb. 419; *Barnett* v. *Goings*, 8 Blackf. 284; *Randall* v. *Lunt*, 51 Me. 246. Where, without her consent, the husband has appropriated the like amount of his wife's property. *Wiley* v. *Gray*, 36 Miss. 510. Where the wife releases her dower. *Andrews* v. *Andrews*, 28 Ala. 432; *Unger* v. *Price*, 9 Md. 552; *Garlick* v. *Strong*, 3 Paige (N. Y.), 440. And if the facts show that the settlement upon the wife, though voluntary, was a proper and reasonable one at the time in the condition of the husband's estate, it will not be invalidated by his subsequent inability to pay a debt then existing. *Babcock* v. *Eckler*, 24 N. Y. (10 Smith) 623; *Vason* v. *Bell*, 53 Ga. 416; *Townsend* v. *Maynard*, 45 Penn. St. 198. But a settlement of all or a greater part of the husband's property upon his wife, as a reasonable provision for her support, will not be sustained. *Coates* v. *Gerlach*, 44 Penn. St. 43; *Lewis* v. *Caperton*, 8 Gratt. (Va.) 148.

Where the consideration advanced by the wife is grossly inadequate, the settlement cannot be sustained in equity, except so far as to secure the repayment of the consideration; and if the wife be privy to a fraud upon others, with her husband, not even to that extent. *Herschfeldt* v. *George*, 6 Mich. 456; *Skillman* v. *Skillman*, 2 Beasl. 403; *Farmers' Bank* v. *Long*, 7 Bush (Ky.), 337. A settlement upon the wife by the husband, in consideration of her living with him, is voluntary merely. *Roberts* v. *Frisby*, 38 Texas, 219. So, too, is one in consideration of her services. *Belford* v. *Crane*, 1 C. E. Green, 265; *Keith* v. *Woombell*, 8 Pick. 211.

Voluntary post-nuptial settlements, like other voluntary conveyances, as between the parties thereto and those claiming under them, are good and binding. *Hunt* v. *Johnson*, 44 N. Y. (5 Hand) 27; 4 Am.

Rep. 631; *Bill* v. *Cureton*, 2 Myl. & K. 510; *Doe* v. *Rusham*, 17 Q. B. 724. And the manner in which a gift directly from the husband to the wife will be sustained, depends largely upon the legislation regarding the rights of married women in the particular State.

A marriage settlement securing property to the husband in trust for the wife for her sole and separate use, free from the claims of his creditors, to continue her in reference to said property a *feme sole* to all intents and purposes, her right to dispose of the same as aforesaid in any way which she may choose, in no event to be impaired or restricted, does not confer a right to mortgage the lands for the debt of the husband and wife. *Head* v. *Temple*, 4 Heisk. (Tenn.) 34.

Prior advances to the husband out of the wife's property will not constitute a consideration for a subsequent settlement on the wife when not mentioned therein, unless there was an agreement at the time that they were made to secure her a settlement. *Perkins* v. *Perkins*, 1 Tenn. Ch. 537.

Where the husband procures land to be conveyed in trust for the sole and separate use of the wife to dispose of to any person she may wish by deed, or by appointment in writing in nature of a will, and the wife dies without disposing of the same, as the trust was not declared for the wife and her heirs, there will be a contingent resulting trust in favor of the husband. *Levy* v. *Griffis*, 65 N. C. 236. If a husband fraudulently takes a conveyance of land in his own name, the consideration having been paid by his wife, a trust thereby results in the wife's favor. *Tracy* v. *Kelley*, 52 Ind. 535.

§ 9. **To recover for torts to her.** At common law when a married woman was injured in her person or character she was joined with her husband in an action for such injury. *Davies* v. *Solomon*, L. R., 7 Q. B. 112; *Heirn* v. *McCaughan*, 32 Miss. 17; *Pillow* v. *Bushnell*, 5 Barb. 156. And in such action nothing could be recovered for loss of service or for the expenses to which the husband had been subjected in taking care of her. *Brooks* v. *Schwerin*, 54 N. Y. (9 Sick.) 344; *Dengate* v. *Gardiner*, 4 M. & W. 6; *Longmeid* v. *Holliday*, 6 Exch. 761.

But the tendency of modern legislation is to establish the right to recover for injuries to her person or character, as the wife's separate property. And if a married woman sustains an injury through the negligence of a railroad company she can recover damages for her injury and suffering. But the husband would still sue in his own name for the loss of income resulting from her incapacity and the expenses of her cure. *Klein* v. *Jewett*, 26 N. J. Eq. 474; *H. M. Filer* v. *N. Y. C. R. R. Co.*, 49 N. Y. (4 Sick.) 47; 10 Am. Rep. 327; *Berger* v.

Jacobs, 21 Mich. 215; *Jeanes* v. *Davis*, 3 Penn. L. J. 60. In Vermont, notice of injury to the wife and claim for damages by the husband alone is sufficient. *Babcock* v. *Guilford*, 47 Vt. 519.

Where a wife being abandoned by the husband receives an injury she may recover for the loss of time and for the money expended for medical aid (*Peru* v. *French*, 55 Ill. 317); but the husband may discharge the cause of action so as to bar the wife's remedy even though they are living apart through his fault. *Ballard* v. *Russell*, 33 Me. 196.

TITLE V.

DUTIES AND LIABILITIES OF THE WIFE.

Section 1. For debts before or after marriage. At common law the husband is liable for the debts of the wife before and during coverture. But if her ante-nuptial debts are not recovered against him during the coverture he will be discharged. *Ante* 653, title 3, § 2. And married women's legislation generally has given the wife no power to contract unless in direct reference to her separate property. *Stillwell* v. *Adams*, 29 Ark. 346; *Furness* v. *McGovern*, 78 Ill. 337; *Yale* v. *Dederer*, 18 N. Y. (4 Smith) 265; S. C., 22 N. Y. (8 Smith 451. In equity, as under statute, she has capacity to make all contracts necessary and convenient to her as owner of goods, or lands; but she has no power to incur obligations as a person *sui juris* when the purpose of the contract is neither to benefit her or her separate estate. *Huyler* v. *Atwood*, 26 N. J. Eq. 504; *Crickmore* v. *Breckenridge*, 51 Ind. 294; *Manhattan B. & M. Co.* v. *Thompson*, 58 N. Y. (13 Sick.) 80.

In Massachusetts a married woman is liable on a promissory note signed by her, the consideration of which is labor on land of which she is a tenant in common with her husband. *Burr* v. *Swan*, 118 Mass. 588.

A married woman living with her husband is not liable for necessaries. *Choppin* v. *Harmon*, 24 La. Ann. 327; *Powers* v. *Russell*, 26 Mich. 179. Nor can she be compelled after she becomes *sole* to make good or execute a contract which she made while unmarried, but which was void in its origin, or which she was legally incompetent to enter into. *Ross* v. *Singleton*, 1 Del. Ch. 149.

Where husband and wife executed a joint note for the debt of the wife before marriage, and the husband dying, the wife promised to pay the note, she was held liable thereon. The note did not extin-

guish the original indebtedness; and though not obligatory on the wife during coverture, it was capable of ratification, and was ratified by the promise after she became discovert. *Parker* v. *Cowan*, 1 Heisk. (Tenn.) 518. But in New York, a promise made by a woman, after the dissolution of the marriage, to pay for goods purchased by her during coverture, is void and cannot be enforced by action. *Watkins* v. *Halstead*, 2 Sandf. 311. But, since the married women's act, it may be otherwise. *Goulding* v. *Davidson*, 26 N. Y. (12 Smith) 640.

§ 2. **Liability for torts.** As we have seen, *ante*, 654, § 3 of title 3, the husband is liable for the torts of the wife, whether committed before or during coverture. If committed when under his control, he alone is liable; otherwise they are jointly liable. *Cassin* v. *Delany*, 38 N. Y. (11 Tiff.) 178; *Gage* v. *Reed*, 15 Johns. 403; *McKeown* v. *Johnson*, 1 McCord, 578. But after a decree of absolute divorce between the parties to a marriage, the man is not liable to a joint action for a tort committed during the coverture by the woman from whom he was divorced. *Capel* v. *Powell*, 17 C. B. (N. S.) 743. In equity the husband is not liable for the fraud of the wife directly connected with her contract (*Liverpool Adelphi Loan Association* v. *Fairhurst*, 9 Exch. 422; *Keen* v. *Hartman*, 48 Penn. St. 497; *Carleton* v. *Haywood*, 49 N. H. 314); and the husband cannot be sued for such fraud jointly with the wife. *Woodward* v. *Barnes*, 46 Vt. 332; 14 Am. Rep. 626; *Barnes* v. *Harris*, Busbee, 15. Under the statutes of New York, the liability of the husband for the personal torts of the wife is at common law; but when such torts are committed in the management and control of her separate property, the rule is changed and the wife only is liable. *Baum* v. *Mullen*, 47 N. Y. (2 Sick.) 577. She is bound and affected too by the frauds and omissions of her husband, in attending, as her agent, to her property intrusted by her to him. *Adams* v. *Mills*, 6 J. & Sp. (N. Y.) 16. But she is not liable for the tort of her husband in which she does not participate as an actor, and by which she is not profited, or her separate estate benefited, by reason of a prior assent, advice or authorization by her. *Vanneman* v. *Powers*, 56 N. Y. (11 Sick.) 39.

In order to excuse the crime of the wife the coercion of the husband must be made to appear from all the facts and circumstances of the case. *Edwards* v. *State*, 27 Ark. 493. She is not protected from responsibility for crime committed by her husband's order or direction, if she is not within his control and coercion at the time. *Commonwealth* v. *Feeney*, 13 Allen (Mass.), 560; *State* v. *Potter*, 42 Vt. 495. But if she commits an assault in the immediate presence of her hus-

band, she is presumed to act under his coercion. *Commonwealth* v. *Eagan*, 103 Mass. 71; *State* v. *Williams*, 65 N. C. 398.

A woman is not liable, after a second marriage, for the tortious acts of her second husband intermeddling with the assets of her first husband's estate, whether such acts be committed before or after the second marriage. *Witcher* v. *Wilson*, 47 Miss. 663.

If a wife voluntarily accompany her husband, and they both engage in an attempt to commit a felony, and the husband commits a murder in her presence, she is guilty also, although she gave no intentional assistance to him in striking the fatal blow. *Miller* v. *State*, 25 Wis. 384.

Proof of illegal sales of intoxicating liquors by a wife in the absence of her husband, and in an inn kept by both, is sufficient to warrant her conviction on a joint indictment with him for keeping a liquor nuisance. *Commonwealth* v. *Tryon*, 99 Mass. 442.

A wife is liable in an action brought against her and her husband jointly, for converting to her personal use wearing apparel stolen from the plaintiff and sold and delivered by the thief to her in her husband's absence. *Heckle* v. *Lurvey*, 101 Mass. 344; 3 Am. Rep. 366.

§ 3. **Contracts during coverture.** A married woman has no power to contract except in direct reference to herself or to her separate property. *Stillwell* v. *Adams*, 29 Ark. 346; *Huyler* v. *Atwood*, 26 N. J. Eq. 504; *Wright* v. *Dresser*, 110 Mass. 51. She may contract for her own benefit or for that of her own separate estate, and such contract will be binding at law or in equity. *Donovan's Appeal*, 41 Conn. 551 *First Nat. Bank* v. *Haire*, 36 Iowa, 443; *Cookson* v. *Toole*, 59 Ill. 515. This is equally the case whether such separate estate has been created by deed or by will, or exists by force of the statute relating to the property of married women. *Perkins* v. *Elliott*, 23 N. J. Eq. 526; *Athol, etc., Machine Co.* v. *Fuller*, 107 Mass. 437; *Batchelder* v. *Sargent*, 47 N. H. 262.

To create a charge against her separate property it is not sufficient that the credit is given upon the faith of it; she must contract with regard to it. *Hodson* v. *Davis*, 43 Ind. 258; *Manhattan B. & M. Co.* v. *Thompson*, 58 N. Y. (13 Sick.) 80; *West* v. *Laraway*, 28 Mich. 464.

Where the wife has been abandoned by the husband, or if he be *civiliter mortuus*, she has power, as a *feme sole*, to make contracts. *Blumenberg* v. *Adams*, 49 Cal. 309; *Walford* v. *The Duchess of Pienne*, 2 Esp. N. P. 554; *DeGaillon* v. *L'Aigle*, 1 Bos. & Pull. 357.

An engagement by a married woman to purchase land may be sustained and enforced in her favor (*Vance* v. *Nogle*, 70 Penn. St. 176;

Hamilton v. *Taylor*, 2 Cin. [Ohio] 402); or against her where she has a separate estate. *Hinckley* v. *Smith*, 51 N. Y. (6 Sick.) 21. But she may not bind herself as the purchaser of land, at commissioner's sale, even though she appear in court, consent to the confirmation, and pay part of the purchase-price. *Robinson* v. *Robinson*, 11 Bush (Ky.). 174. Equity will not enforce her contract for the sale of her estate; but it will charge such estate with the value of the property delivered to her as the consideration of such contract, and with moneys expended by the purchaser in improving it with the husband's consent. *Pierson* v. *Lum*, 25 N. J. Eq. 390.

The contract of a married woman to pay for the services of an attorney in prosecuting a libel for a divorce against her husband is not binding. *Drais* v. *Hogan*, 50 Cal. 121; *Whipple* v. *Giles*, 55 N. H. 139. And the fact that a divorce was obtained and she afterward promised to pay, makes no difference. *Putnam* v. *Tennyson*, 50 Ind. 456. A woman having become *sole* cannot be compelled to fulfill a contract entered into by her when incompetent on account of *coverture*. *Ross* v. *Singleton*, 1 Del. Ch. 149.

At common law a married woman cannot be a party to a bill or note. *Bogert* v. *Gulick*, 65 Barb. 322; 45 How. 385; *Hoffman* v. *Treadwell*, 7 J. & Sp. 183.

The promissory note of a married woman is void, and a mortgage given upon her separate real estate to secure it cannot be foreclosed. *Brick* v. *Scott*, 47 Ind. 299; *Stribling* v. *Bank of Kentucky*, 48 Ala. 451. But a contract founded upon a proper consideration by which the husband and wife bind themselves to execute a mortgage of the separate estate of the wife will be enforced in equity, and such estate will be held liable for the debt intended to be secured. *Hall* v. *Eccleston*, 37 Md. 510.

There may be a promissory note made by a married woman which she may make a charge upon her separate estate. *Maxon* v. *Scott*, 55 N. Y. (10 Sick.) 247; *Corn Exchange Ins. Co.* v. *Babcock*, 42 N. Y. (3 Hand) 613.

A married woman is not bound by a covenant of quiet enjoyment in a lease of her lands in which her husband joins, and her heirs and devisees are not answerable after her death for any breach thereof. *Foster* v. *Wilcox*, 10 R. I. 443; 14 Am. Rep. 698.

TITLE VI.

ACTIONS FOR BREACH OF PROMISE.

Section 1. Of the promise or contract. See Vol. 1, pp. 722–725. No formal language is necessary to constitute the promise or contract. The conduct and statements of the parties may declare it. *Royal* v. *Smith*, 40 Iowa, 615; *Coil* v. *Wallace*, 24 N. J. L. 291; *Honeyman* v. *Campbell*, 5 Wils. & Shaw, 144; S. C., 2 Dow. & Clark, 282.

The promises must be reciprocal or no action can be maintained for the breach. *Standiford* v. *Gentry*, 32 Mo. 477; *Allard* v. *Smith*, 2 Metc. (Ky.) 297; *Weaver* v. *Bachert*, 2 Penn. St. 80.

If an unreasonable condition be attached to the promise, or if the promise be to marry at a time unreasonably distant, it is voidable at the option of either party. *Hartley* v. *Rice*, 10 East, 24.

An agreement by a man to marry when a divorce should be decreed between himself and his wife in a suit then pending, is contrary to public policy and void. *Noice* v. *Brown*, 38 N. J. L. 228.

Defendant's declarations that he would make a good home for plaintiff are admissible to establish the promise. *Button* v. *McCauley*. 1 Abb. (N. Y.) App. 282.

§ 2. **Of the breach.** If a day be fixed and agreed upon for the performance of the contract, and before that day arrives, either party refuses to perform the contract at any time, such party is instantly liable in an action for damages for breach of promise. Vol. 1, p. 724. But a man is not bound by his contract to marry a lewd woman, entered into in ignorance of her character. *Von Storch* v. *Griffin*, 77 Penn. St. 504; Vol. 1, 725; *Baddely* v. *Mortlock*, Holt, 151. And he may show in defense to a suit for breach of marriage promise that he was afflicted with an incurable disease. *Sprague* v. *Craig*, 51 Ill. 288; Vol. 1, 725.

Seduction, if alleged in the complaint, may be shown to enhance damages but not otherwise. *Leavitt* v. *Cutler*, 37 Wis. 46; *Cates* v. *McKinney*, 48 Ind. 562; 17 Am. Rep. 768. And the plaintiff may prove that she appeared to be sincerely attached to defendant. *Sprague* v. *Craig*, 51 Ill. 288.

§ 3. **Of the defenses.** It is competent for the defendant to show statements made by the plaintiff a few days subsequent to the breach, which were inconsistent with any purpose to fulfill the engagement in a spirit befitting the relation contemplated by it, and such as would render a breach of the contract of little if any injury to her. *Miller*

v. *Rosier*, 31 Mich. 475. But the defendant may not prove statements to that effect, if made during the pendency of the action. *Miller* v. *Hayes*, 34 Iowa, 496; 11 Am. Rep. 154. An allegation by way of justification in defense of an action for a breach of promise of marriage that plaintiff is unchaste, if not established by proof upon the trial, should be considered by the jury in aggravation of damages. *Thorn* v. *Knapp*, 42 N. Y. (3 Hand) 474; 1 Am. Rep. 651.

CHAPTER LXXX.

INJUNCTIONS.

TITLE I.

OF THE GENERAL RULES OF LAW RELATING TO INJUNCTIONS.

ARTICLE I.

DEFINITION, NATURE AND PURPOSE.

Section 1. Definition. A writ of injunction may be described to be a judicial process, whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ. 2 Story's Eq. Jur., § 861. It is as effective to enforce a right as to prevent a wrong. *Pierce* v. *City of New Orleans*, 18 La. Ann. 242. In general, however, the writ is much more frequently used to prevent a meditated wrong than to redress an injury already done, and it is, therefore, to be regarded more as a preventive than as a restorative or remedial process. *Blakemore* v. *Glamorganshire*, 1 Myl. & K. 154; *McMinnville, etc., R. R. Co.* v. *Huggins*, 7 Coldw. (Tenn.) 217; *Attorney-General* v. *New Jersey Railroad, etc. Co.*, 2 Green's (N. J.) Ch. 136; *Ward* v. *Kelsey*, 14 Abb. 106; *Lexington City National Bank* v. *Guynn*, 6 Bush (Ky.), 486. And it has been held that an injunction, unless issued after the decree, in which case it becomes a *judicial* process, can only be used for the purpose of prevention and protection, and not for the purpose of commanding the defendant to undo any thing he had previously done. *Washington University* v. *Green*, 1 Md. Ch. 97. And see *Bradbury* v. *Manchester, etc., Railway Co.*, 8 Eng. Law & Eq. 143. So, it is said that the remedy for injuries already committed, though sometimes given as an incident to an injunction, is only allowed where a sufficient showing for the injunction is made out and the injury has resulted from the act enjoined. *Sherman* v. *Clark*, 4 Nev. 138. See *Smith* v. *Smith*, 32 L. T. (N. S.) 787.

§ 2. **Classification of injunctions.** From the definition given in the preceding section, it follows that injunctions may be *mandatory*, or *preventive*, according as they command the defendant to do or to refrain from doing a particular act. The latter, which is the more common form of injunctions, is sometimes called the *remedial* writ of injunction; while the former is sometimes called the *judicial* writ, for the reason that it issues after a decree, and is in the nature of an execution to enforce the same. See Eden on Injunct. 1, 2; Story's Eq. Jur., § 861; *Gaines* v. *Hale*, 26 Ark. 168, 199; *Huguenin* v. *Baseley* 15 Ves. 179; *Gale* v. *Abbott*, 8 Jur. (N. S.) 987. Mandatory injunctions may, however, be granted on interlocutory applications. *Hervey* v. *Smith*, 1 Kay & J. 392; *Robinson* v. *Byron*, 1 Bro. C. C. 588; *Cole Silver Mining Co.* v. *Virginia, etc., Water Co.*, 1 Sawyer, 685. And although a court of equity but seldom interferes to compel the doing of a positive act, yet it may exercise its power through the medium of an injunction, to compel a party to do an act, by restraining him from doing the reverse of what he is desired to do. *Lane* v. *Newdigate*, 10 Ves. 192; *Mexborough* v. *Bower*, 7 Beav. 127. But see *Akrill* v. *Selden*, 1 Barb. 316.

With respect to the duration of the relief which they afford, injunctions are divided into two general classes; namely, preliminary or interlocutory injunctions, and final or perpetual injunctions. An injunction issued as a provisional remedy, restraining a defendant in an action from the commission of certain specified acts until the decision of the action upon the hearing, or until the further order of the court, belongs to the former class, while an injunction which forms a part of the decree of the court, made upon the hearing of the cause upon the merits, and which perpetually restrains a defendant from asserting a right or committing an act which would be contrary to equity and good conscience, belongs to the latter. *New York Printing, etc., Co.* v. *Fitch*, 1 Paige, 97; *Murray* v. *Knapp*, 42 How. 462; S. C., 62 Barb. 566. The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order is made, or to stop the mischief complained of, until an opportunity is afforded for a full and deliberate investigation. *Blakemore* v. *Glamorganshire*, 1 Myl. & K. 154; *Attorney-General* v. *Paterson*, 1 Stockt. (N. J.) 624. It cannot be used to take property out of the possession of one party and put it into the possession of the other, nor can it be used to harass or punish a defendant without benefit to the complainant. *Farmers' Railroad Co.* v. *Reno, etc., Railway Co.*, 53 Penn. St. 224; *Murdock's Case*, 2 Bland's (Md.) Ch. 461. Its object is merely to prevent such acts during the litigation as would preclude the

court from giving relief at the end. *Van Veghten* v. *Howland*, 12 Abb. (N. S.) 461. And see *Great Western Railway Co.* v. *Birmingham, etc., Railway Co.*, 2 Phillips' Ch. 597.

Preliminary or interlocutory injunctions are classified into *common* and *special*. The first named class embraces those which are granted as of course, in aid of, or as ancillary to some primary equity, which the bill seeks to enforce. They are granted without notice to the opposite party. See *Martin* v. *Cook*, 6 Jones' (N. C.) Eq. 199; *Murray* v. *Knapp*, 62 Barb. 566; S. C., 42 How. 462. The class last named, or *special* injunctions, are those which are granted for the prevention of irreparable injury, or to stay waste, where the preventive aid of equity is the ultimate and only relief sought. See *Purnell* v. *Daniel*, 8 Ired. (N. C.) Eq. 9; *Buckley* v. *Corse*, Saxt. (N. J.) 507; *Woodworth* v. *Rogers*, 3 Woodb. & M. 135; *Bradford* v. *Peckham*, 9 R. I. 250. They are issued sometimes on the merits disclosed by the answer, sometimes on affidavits before the answer is filed, and sometimes even without notice and before the defendant has appeared. See Id.; *Anonymous*, 1 Ves. Jr. 140; *Perry* v. *Parker*, 1 Woodb. & M. 280. The courts of the United States cannot order temporary injunctions, except on reasonable notice to the adverse party or his attorney. Id.; *Mowrey* v. *Indianapolis, etc., R. R. Co.*, 4 Biss. 78.

§ 3. **Nature of injury and relief sought.** There are many cases in which a complainant may be entitled to a perpetual injunction on the hearing, when it would be manifestly improper to grant an injunction *in limine*. The final injunction is, in many cases, a matter of strict right, and is granted as a necessary consequence of the decree made in the cause. *New York Printing, etc., Co.* v. *Fitch*, 1 Paige, 97. On the contrary, the preliminary injunction, before answer, is a matter resting altogether in the discretion of the court, and ought not to be granted unless the injury is pressing and the delay is dangerous. Id.; *Akin* v. *Davis*, 14 Kan. 145. It will not be granted in doubtful cases, or in new ones not coming within well-established principles. *Ramsey* v. *Erie R. R. Co.*, 38 How. 193; S. C., 7 Abb. (N. S.) 156; *Dickey* v. *Reed*, 78 Ill. 261; *Minnig's Appeal*, 82 Penn. St. 373. But it should be borne in mind that a complainant may be entitled to a preliminary injunction, although his right to the relief prayed may ultimately fail. A court of equity will in many cases interfere by injunction, to preserve property in *statu quo* during the pendency of a suit, in which the rights to it are to be decided; and that without expressing, and often without having the means of forming, any opinion as to such rights. *Great Western Railway Co.* v. *Birmingham, etc., Railway Co.*, 2 Phillips' Ch. 597.

In granting injunctions, the courts are not restricted to acts "contrary to law," but may exercise this power to restrain acts contrary to equity also. *Stockdale* v. *Ullery*, 37 Penn. St. 486.

Past injuries are in themselves no ground for an injunction (see *Coker* v. *Simpson*, 7 Cal. 340); and in brief, an injunction will only be granted when necessary to restrain irreparable mischief, suppress oppressive and interminable litigation, or prevent a multiplicity of suits. *Cobb* v. *Smith*, 16 Wis. 661

§ 4. **Right to relief must be clear.** It is, as a general rule, only where the rights of the parties are or can be clearly ascertained, and are free from all reasonable doubt, that jurisdiction will be entertained in the first instance to restrain an act by injunction. *Brown* v. *Newall*, 2 Myl. & C. 558, 570; *Bonaparte* v. *Camden, etc., Railroad Co.*, 1 Baldw. (C. C.) 218; *Agate* v. *Lowenbein*, 4 Daly (N. Y.), 62; *Minnig's Appeal*, 82 Penn. St. 373. It is the duty of the court rather to protect acknowledged rights than to establish new and doubtful ones. *Roath* v. *Driscoll*, 20 Conn. 533; *Burnham* v. *Kempton*, 44 N. H. 92. And it is always a fatal objection to the allowance of an injunction, for the purpose of protecting property during a litigation, that the party seeking the injunction has no title to or interest in the property, and no claim to the ultimate relief sought by the litigation. *State of California* v. *McGlynn*, 20 Cal. 233. And see *Washburn* v. *Miller*, 117 Mass. 376.

Where, however, the respective rights of the parties are doubtful, and the continuance of the acts complained of will work permanent and substantial damages to the complainant, and the injury resulting to the other party from a temporary injunction and the consequent delay can cause no loss that cannot be fully compensated, and for that compensation he can have security, the court may, in its discretion, grant a provisional injunction pending the litigation, and until the rights of the parties are definitely established by a final judgment in the cause. *Spear* v. *Cutter*, 5 Barb. 486; *Kerlin* v. *West*, 3 Green's (N. J.) Eq. 449. See *ante*, 194, *Equity*. In the exercise of this discretionary power, the court will weigh the nature and extent of the injury which the plaintiff will suffer if the order be withheld, and also the consequences to the opposite party if the order be granted, and it will grant or withhold the relief sought according to the exigencies of the case. *Ollendorff* v. *Black*, 1 Eng. Law & Eq. 114; *Heath* v. *President of Gold Exchange*, 38 How. 168; S. C., 7 Abb. (N. S.) 251. And see *Elmhirst* v. *Spencer*, 2 Mac. & G. 60; *Berkeley* v. *Smith*, 27 Gratt. (Va.) 892

§ 5. **No remedy at law.** Where an injury is of such a nature that

it cannot be adequately compensated in damages, or cannot be measured by any certain pecuniary standard, it is irreparable, and will be restrained by injunction. *Wilson* v. *City of Mineral Point*, 39 Wis. 160. But it is an established principle that a court of equity will not lend its aid to restrain, by injunction, the commission of any act injurious to the complainant, when he has an adequate remedy at law. *Camp* v. *Matheson*, 30 Ga. 170; *Arnold* v. *Clepper*, 24 Mo. 273; *Wilkins* v. *Hague*, 6 Jones' (N. C.) Eq. 479; *Banks* v. *Busey*, 34 Md. 437; *Murphy* v. *Harrison*, 29 Ark. 340; *Harkinson's Appeal*, 78 Penn. St. 196; *Balcom* v. *Julien*, 22 How. (N. Y.) 349; *Whittlesey* v. *Hartford, etc., R. R. Co.*, 23 Conn. 421. And where the party asking an injunction has an adequate remedy by a statutory proceeding, though it is one not known to the common law, an injunction should be refused upon the same general ground as where there is an adequate remedy at law. *Hamersley* v. *Germantown, etc., Turnp. Co.*, 8 Phil. (Penn.) 314; *Brady* v. *Weightman*, id. 322. So, where an injunction is sought as auxiliary to an action already commenced, and the end to be attained by it can be as completely accomplished by motion upon the clearest principles of equity practice, a new suit instituted simply for such injunction cannot be sustained. *Homer* v. *Kane*, 7 Nev. 61. So, an injunction will be denied where notice of the pendency of the action is as effectual. *Stevenson* v. *Fayerweather*, 21 How. (N. Y.) 449. And in general an injunction will not be granted for any purpose which can be attained by any other ordinary process. *Ward* v. *Kelsey*, 14 Abb. (N. Y.) 106; *People* v. *Mattier*, 2 Abb. (N. S.) 289; *Johnson* v. *Jones*, 75 N. C. 206.

The remedy at law must, however, be complete, prompt and efficient. If the rights of a party can only be enforced by long-continued, strenuous and expensive litigation, and those rights can be more promptly and efficiently asserted in equity, a stringent reason is offered for equitable interference in the form of an injunction. *West Point Iron Co.* v. *Reymert*, 45 N. Y. (6 Hand) 703; *Crane* v. *McCoy*, 1 Bond, 422. See *ante*, 135, *Equity*.

§ 6. **Equity, penalty or forfeiture.** It has been laid down as a general principle, that in the case of an agreed penalty or forfeiture the parties are not usually entitled to an injunction, but must invoke their remedy at law. *Nessle* v. *Reese*, 29 How. (N. Y.) 382; S. C., 19 Abb. 240; *Lamport* v. *Abbott*, 12 How. 340; *Coe* v. *Columbus, etc., Railroad Co.*, 10 Ohio St. 372. It has, however, been held that the breach of a restrictive covenant in a lease may be enjoined, though secured by forfeiture of the lease and a penalty. *Barret* v. *Blagrave*, 5 Ves. 555. See, also, *Woodruff* v. *Water Power Co.*, 2 Stockt. (N. J.)

Ch. 489. The court will not sustain an action to restrain a prosecution to recover a penalty imposed by statute, on the ground of the invalidity of the statute, at least until its invalidity has been determined in a previous action. *Wallack* v. *Society for Reformation, etc.*, 67 N. Y. (22 Sick.) 23. See *ante*, 159, 160.

§ 7. **Illegal demand or transaction.** A demand growing out of an illegal transaction cannot be made the foundation of a proceeding in equity for an injunction against a legal demand. Whether a party pursues his remedy at law or in equity, his demand must not rest on a violation of law for its foundation, nor can it arise out of illegal acts opposed to laws which he is bound to obey, nor depend on conduct *contra bonos mores*, or sound policy. *Pond* v. *Smith*, 4 Conn. 297; *Haight* v. *Bergh*, 2 H. W. Green, 386. See, also, *Smith* v. *Lockwood*, 10 N. Y. Leg. Obs. 232; S. C., 13 Barb. 209. See *ante*, 135.

§ 8. **Irreparable injury.** Where the injury is *irreparable*, not susceptible of being adequately compensated by damages, or such as, from its continuance, must occasion a constantly recurring grievance which cannot be otherwise prevented, as where loss of health, loss of trade or business, destruction of the means of subsistence, or permanent ruin to property, may or will ensue from the wrongful acts, a court of equity will interfere by injunction in furtherance of justice and the violated rights of the party. *West Point Iron Co.* v. *Reymert*, 45 N. Y. (6 Hand) 703; *Webber* v. *Gage*, 39 N. H. 182; *Nicodemus* v. *Nicodemus*, 41 Md. 529; *Schurmeier* v. *St. Paul, etc., Railroad Co.*, 8 Minn. 113; *Wilson* v. *City of Mineral Point*, 39 Wis. 160. But where no irreparable injury is alleged beyond a general averment of a breach of contract, a court of equity will not interfere. *Western Union Telegraph Co.* v. *Philadelphia, etc., Railroad Co.*, 9 Phil. (Penn.) 494.

§ 9. **Action at law to establish right.** Ordinarily, an injunction will not be granted where the parties are in dispute concerning their legal rights until the right is established at law. *Mammoth Vein Coal Co.'s Appeal*, 54 Penn. St. 183; *Stevens* v. *Paterson, etc., R. R. Co.*, 5 C. E. Green (N. J.), 126. If the right has not been previously established at law, an injunction will be granted only in a case of strong and imperious necessity. *Olmstead* v. *Loomis*, 6 Barb. 152; *Walker* v. *Society, etc.*, 67 N. Y. (22 Sick.) 23. And in no case will relief be extended by injunction beyond what is necessary for the protection of the plaintiff's rights. *Gallatin* v. *Oriental Bank*, 16 How. (N. Y.) 253. See *Shrewsbury, etc.*, v. *Stour Valley Railway Co.*, 21 Eng. L. & Eq. 628, 636. Where the thing complained of is not necessarily a nuisance, but may or may not be so, according to circumstances,

a court of equity will not stay a party until the matter has been tried at law, or, in special cases, by a jury, on an issue directed out of chancery. *Lake View* v. *Letz*, 44 Ill. 81; *Dunning* v. *Aurora*, 40 id. 481; *Ripon* v. *Hobart*, 3 Mylne & K. 169.

§ 10. **Delay in applying for injunction.** To entitle a party to an injunction he must not be guilty of any improper delay in making the application for it. *Field* v. *Beaumont*, 3 Madd. 102; *Isaacson* v. *Thompson*, 20 W. R. 196; *Long* v. *Cross*, 5 Jones' (N. C.) Eq. 323; *Burden* v. *Stein*, 27 Ala. 104. And especially where the application is made *ex parte*. *Earl of Mexborough* v. *Bower*, 7 Beav. 127. But notwithstanding the general rule that *laches* will work a forfeiture of equitable relief, the court in its discretion may grant an injunction where the complainant's right is clear, or may sustain one already granted, although the plaintiff has delayed defending his rights, if good and valid reasons are assigned for the delay. *Schermehorn* v. *L'Espenasse*, 2 Dall. (Penn.) 360. And the question, what constitutes *laches* or unreasonable delay must be determined by the facts presented in the several cases as they arise. *Binney's Case*, 2 Bland's (Md.) Ch. 99.

In one case the plaintiff's action was for the recovery of damages for an injury to his business, occasioned by the erection of gas works. The action was referred to arbitration, and nearly two years elapsed before the award was made, in the course of which time alterations in the mode of carrying on the business complained of were effected; two months after the date of the award an injunction was applied for, and it was held that there had not been any such acquiescence as to deprive the plaintiff of his right to the injunction. *Imperial Gas-light, etc., Co.* v. *Broadbent*, 7 H. L. Cas. 600.

But an injunction to restrain a defendant from publishing a new edition of a work, on the ground of an alleged piracy from the works of plaintiff, was denied where the first violation of the plaintiff's rights consisted in the publication of the first edition thereof some seven years previously. *Baily* v. *Taylor*, Russ. & Myl. 73. So, where the plaintiff is otherwise clearly entitled to an injunction to prevent an infringement of his copyright, the court will refuse the relief where constructive knowledge of such infringement must have existed for six years. *Lewis* v. *Chapman*, 3 Beav. 133.

Although one party may be disentitled by acquiescence to an injunction, it does not consequently follow that the opposite party is entitled to an injunction to prevent the first from recovering damages at law. Equity may leave both parties to their legal rights. *Bankart* v. *Houghton*, 27 Beav. 425.

§ 11. **Notice of the proceedings.** According to the English prac-

tice, if, upon an application *ex parte*, the court thinks that the case is not so urgent as to require its immediate interference, it will order notice of the application to be served on the defendant. See *Lord Byron* v. *Johnston*, 2 Mer. 29; Kerr on Injunct. 611. If the defendant has appeared, he must, as a general rule, be served. *Collard* v. *Cooper*, 6 Madd. 190; *Langham* v. *Great Northern Railway Co.*, 1 DeG. & S. 486. But in cases of extreme urgency the court may grant an injunction without notice even after appearance. *Allard* v. *Jones*, 15 Ves. 605. See *Vance* v. *Workman*, 8 Blackf. (Ind.) 306.

To sustain an injunction granted without notice, all the essential and material allegations which are not positively stated in the bill must be otherwise proved. *Dinehart* v. *Lafayette*, 19 Wis. 677.

Injunctions cannot be granted in the courts of the United States without notice, and hence all of them are regarded as falling within the class of *special* injunctions. *Mowrey* v. *Indianapolis, etc., Railroad Co.*, 4 Biss. 78; *ante*, 681, § 2; and *Marshall* v. *Beverley*, 5 Wheat. 313.

The doctrine as to notice in the different States varies to some extent, and the practice of the particular State should be consulted. In New Jersey all injunctions are granted upon special application, and the application is generally made *ex parte* on filing the bill. Whether notice shall be given depends upon no settled rule of practice, but on the nature of the case. If it be one of difficulty and importance, the court will generally require notice to be given. *Buckley* v. *Corse*, Saxt. (N. J.) Ch. 504. See *Haring* v. *Kauffman*, 2 Beasl. (N. J.) 397.

In Pennsylvania an injunction cannot be granted until the parties complained of have been served with a *subpœna* to appear and answer; until then they are not in court. *Blair* v. *Boggs Township*, 31 Penn. St. 274.

§ 12. **Not retroactive.** The process of injunction should be applied with the utmost caution. The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which, on just and equitable grounds, ought to be prevented. *Morse* v. *Machias Water Power Co.*, 42 Me. 119. An injunction is never *retroactive*. It can never make an act unlawful, or a disobedience of its provisions, where such act was done before the injunction was granted. *People* v. *Albany, etc., Railroad Co.*, 20 How. (N. Y.) 358; S. C., 12 Abb. 171. Nor does it operate upon proceedings subsequent to its allowance, but before its service. *Ramsdell* v. *Craighill*, 9 Ohio, 197. If the injury be already committed, an injunction cannot operate to cor-

rect it, and equity will not interfere for the purpose of punishment, or to compel persons to do right, but simply to prevent them from doing wrong. *Attorney-General* v. *New Jersey, etc., Railroad Co.*, 2 Green's (N. J.) Ch. 136; *Bosley* v. *Susquehanna Canal*, 3 Bland's (Md.) Ch. 63; *Lexington City Nat. Bank* v. *Guynn*, 6 Bush (Ky.), 486. See *ante*, 681, § 2. Nor will an injunction be granted for the enforcement of right or the prevention of wrong in the abstract, and disconnected with any injury or damage to the person who seeks the relief. *Goodrich* v. *Moore*, 2 Minn. 61.

§ 13. **Discretionary.** An injunction cannot be demanded as a matter of right; but the granting of it must always rest in the sound discretion of the court. *Hine* v. *Stephens*, 33 Conn. 497; *Davis* v. *Society for Prevention of Cruelty*, 16 Abb. N. S. (N. Y.) 73, 79; *Reddall* v. *Bryan*, 14 Md. 444; *Tucker* v. *Carpenter*, Hempst. 440. This discretion is not, however, an arbitrary one, but is to be exercised in accordance with established principles of law and equity (*Haywood* v. *Cope*, 25 Beav. 151; *Ex parte Hays*, 26 Ark. 510; *Marble* v. *Bonhotel*, 35 Ill. 240; *Hobart* v. *Ford*, 6 Nev. 77), and according to the exigencies and the nature of each particular case. *Ollendorff* v. *Black*, 1 Eng. L. & Eq. 114. In many cases the court acts upon the rule of preserving property in the same condition that it existed at the commencement of the action, leaving the rights of the litigants to be determined on the final hearing. In doubtful cases the court weighs the nature and extent of the injury which will arise to either party from the granting or withholding of an injunction, and determines the question of equitable relief in the manner best calculated to promote substantial justice. *Cole* v. *Sims*, 23 id. 584; *Church of Holy Innocents* v. *Keech*, 5 Bosw. (N. Y.) 691; *Stevens* v. *Keating*, 2 Phil. Ch. 333.

In general, equity will not enjoin a business simply because it is unlawful; it must also cause irreparable injury, for which there is no redress at law. *Babcock* v. *New Jersey Stock Yard Co.*, 20 N. J. Eq. 296; *Blake* v. *Brooklyn*, 26 Barb. 301; *Erkenbrecher* v. *Cincinnati*, 1 Cinc. (Ohio) 368; *Campbell* v. *Scholfield*, 3 Pittsb. (Penn.) 443. And it has been held, that an injunction ought not to be granted when the benefit secured by it to one party is but of little importance, while it will operate oppressively and to the great annoyance and injury of the other party, unless the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrong-doer of the benefit of any consideration as to its injurious consequences. *Morris, etc., Railroad Co.* v. *Prudden*, 20 N. J. Eq. 530. See, also, *Higbee* v. *Camden, etc., Railroad Co.*, id. 435; *Pettibone* v. *La Crosse, etc., Railroad Co.*, 14 Wis. 443.

Nor will a court of equity interfere by injunction, to prevent an injury merely nominal or theoretical in its nature, although an action at law might be maintained for it. *Bassett* v. *Salisbury, etc., Co*, 47 N. H. 426; *Watrous* v. *Rodgers*, 16 Tex. 410; *St. Joseph, etc., R. R. Co.* v. *Dryden*, 17 Kans. 278; *Jenny* v. *Crase*, 1 Cranch (C. C.), 443. Nor will an injunction be granted where the right is doubtful (*Water Co.* v. *McCallum*, 5 Phil. [Penn.] 93); nor because of the mere apprehension of the petitioner that a wrong may be done (*Goodwin* v. *New York, etc., R. R. Co.*, 43 Conn. 494); nor in favor of a party claiming to exercise a right granted by an act of the legislature clearly unconstitutional (*Moor* v. *Veazie*, 31 Me. 360); and the *laches* of an executor is no ground for an injunction. *Furlow* v. *Tillman*, 21 Ga. 150. So, a party seeking an injunction must show a particular injury, distinct from that which he suffers in common with the public. *Falls Village, etc., Co.* v. *Tibbetts*, 31 Conn. 165.

TITLE II.

IN WHAT CASES ALLOWED.

ARTICLE I.

REAL PROPERTY.

Section 1. Sale of lands. Frequent applications for the exercise of the extraordinary aid of equity by injunction are made in connection with contracts for the sale and purchase of real estate. Sales may be restrained in all cases where they are inequitable or fraudulent as respects the rights or interests of third persons, as in cases of trusts and special authorities and the abuse thereof. *Cockell* v. *Bacon*, 16 Beav. 158. And where a sale has been already made to satisfy certain trusts, and there is danger of a misapplication of the proceeds, the court may restrain the payment of the purchase-money. *Hine* v. *Handy*, 1 Johns. Ch. 6; *Cranston* v. *Plumb*, 54 Barb. 59; *Green* v. *Lowes*, 3 Bro. Ch. 217. So, in all cases where the vendee has been led to purchase real estate through the fraud and misrepresentation of the vendor, a perpetual injunction may be obtained restraining the collection of the purchase-money, on condition that the parties be restored to the position they respectively occupied previous to such sale. *Scott* v. *Bennett*, 3 Gilm. (Ill.) 243; *Brannum* v. *Ellison*, 5 Jones' (N. C.) Eq. 435.

An injunction may issue to restrain a husband from disposing of an estate in fraud of the equitable rights of his wife. *Cadogan* v. *Kennett*, 2 Cowp. 432; *Anonymous*, 6 Mod. 43. So, in case of a mere agreement to convey, defect of title is ground for an injunction in favor of the purchaser. *Buchanan* v. *Alwell*, 8 Humph. (Tenn.) 516. And an injunction will lie to restrain a sale that would throw a cloud on the plaintiff's title, although no title would in fact pass to the purchaser at the sale. *Vogler* v. *Montgomery*, 54 Mo. 578. See, also, *Eldridge* v. *Smith*, 34 Vt. 484; *Rayland* v. *Cantrell*, 49 Ala. 294; *Goodsell* v. *Blumer*, 41 Wis. 436.

But it is no ground for enjoining the sale of real estate under the provisions of a deed of trust, that money is scarce, and that, in consequence of the large cash payment required, a sale at that time will result in great if not irreparable loss to the owner of the property. *Muller* v. *Bayly*, 21 Gratt. (Va.) 521; *Caperton* v. *Landcraft*, 3 W. Va. 540.

And a sale of real estate under legal process will not be enjoined on the ground of irregularities in the proceedings, nor because the judgment on which process issued was void, where no serious injury or embarrassment to title is shown as likely to result from allowing the sale to proceed. *Cameron* v. *White*, 3 Tex. 152. And see *Henderson* v. *Morrill*, 12 id. 1.

And where the defendant is in possession under a claim of right or title, as against the plaintiff, and in no way connected with him in estate, a court of equity will not enjoin him from making a lease or conveyance, on the ground that it would be a cloud upon the plaintiff's title. *Spofford* v. *Bangor, etc., R. R. Co.*, 66 Me. 51.

§ 2. **Mortgage of lands.** All transactions between mortgagor and mortgagee have always been closely scrutinized by courts of equity, and when the latter has taken advantage in any way of the former, or where there has been any detriment or hardship resulting from the inequality of their relative positions, and when there has been a mistake injurious to the former, of which the latter ought in conscience to have apprised him, a court of equity, so far from lending its assistance to consummate a wrong, will interpose to repair it. *Broderick* v. *Smith*, 15 How (N. Y.) 434; S. C., 26 Barb. 539. Thus, a court of equity will sometimes interfere by injunction to restrain a mortgagee from proceeding under his decree of foreclosure and sale, where the proceedings are against conscience and threaten irreparable injury. *Platt* v. *McClure*, 3 Woodb. & M. 151; *High Shoals Mining, etc., Co.* v. *Grier*, 4 Jones' (N. C.) Eq. 132. So, where the mortgagee has impliedly agreed, in consideration of the use of a sum of money, to

extend the time for the payment of a mortgage, the party advancing such consideration may, by injunction, restrain the prosecution of a foreclosure. *Grinnan* v. *Platt*, 31 Barb. 328. See, also, *Pierson* v. *Ryerson*, 1 McCart. (N. J.) 181; *Wilson* v. *Bird*, 28 N. J. Eq. 352.

But equity will not ordinarily interfere by injunction to prevent the foreclosure of a mortgage, unless it be shown that great or irreparable injury would be suffered by the complainant, or unless he shows himself entitled to more immediate relief than can be obtained by the ordinary course of proceedings, and that his rights are clear or beyond reasonable doubt. *Montgomery* v. *McEwen*, 9 Minn. 103. A mere general allegation that the foreclosure would materially injure and embarrass the complainant in his right, is insufficient to warrant the relief. Id. Facts must be stated and not conclusions or inferences from those facts. *Foster* v. *Reynolds*, 38 Mo. 553.

Maryland courts of equity will not interfere by injunction to restrain the sale of mortgaged premises, by the mortgagee, under a power in the mortgage, except for usury in the mortgage debt. And they will not so interfere even on that ground unless the mortgagor pays, or brings into court to be paid, the principal sum actually due with legal interest thereon. *Powell* v. *Hopkins*, 38 Md. 1; *Hill* v. *Reifsnider*, 39 id. 429.

§ 3. **Lease of lands.** In the case of a clear agreement between parties regulating the use of real property, a court of equity will restrain, by injunction, any breach of the covenant, irrespective of considerations as to the advantage or utility of the change as urged by the party guilty. *Smith* v. *Carter*, 18 Beav. 78; *Steward* v. *Winters*, 4 Sandf. Ch. 587. Thus, when a lessee is by the terms of his lease restricted to a particular use of the demised premises, equity will, as a general rule, restrain him from any other use of them, even though no irreparable injury be shown to result from such breach. *Ambler* v. *Skinner*, 7 Rob. (N. Y.) 561; *Frank* v. *Brunnemann*, 8 W. Va. 462. And when such use is by one in possession under and claiming a right to such use, through the lessee, he, as well as the lessee, may be restrained. *Ambler* v. *Skinner*, 7 Rob. (N. Y.) 561. So, an injunction will be granted to prevent a lessee from making material alterations in a dwelling-house, by changing it into a warehouse, or a store, which would produce permanent injury to the building. *Douglass* v. *Wiggins*, 1 Johns. Ch. 435; *Agate* v. *Lowenbein*, 57 N. Y. (12 Sick.) 604.

But when a lessor seeks to enjoin the lessee from using premises for any purpose other than that for which they were leased, it must not only be shown that the premises were leased for a specified purpose,

but also that the lease contained a provision that the premises should be used for that purpose exclusively. *Brugman* v. *Noyes*, 6 Wis. 1.

A court of equity will likewise aid a tenant in preventing his landlord from breaking a covenant, which will work a forfeiture of the tenant's estate, although not made with the tenant, and even when a suit at law cannot be maintained on such covenant. *Rogers* v. *Danforth*, 9 N. J. Eq. 289. But where a plain construction of the covenant does not warrant the interpretation put upon it by the complainant the relief will not be granted. Id. And proceedings instituted by a lessor to recover possession of property demised under a lease from year to year, will not be enjoined on the ground that the lessee has made valuable improvements which will be lost to him in case of his dispossession. *West* v. *Flannagan*, 4 Md. 36.

Where the owners of a public building contracted with the plaintiff, that he, renting a stall from them, should have the exclusive right to exhibit and sell certain specified classes of goods,—it was held that an injunction would lie against them for permitting the exhibition and sale by other renters of stalls within the building of goods so specified. *Altman* v. *Royal Aquarium Society*, L. R., 3 Ch. Div. 228.

§ 4. **Building contracts.** It is a well-established rule, that where an equity is attached to property by the owner, all persons purchasing, with notice of that equity, will stand in the same relation to the original vendor as did the party from whom they purchased, whether such equity attached by force of a covenant or a mere agreement. *Tulk* v. *Moxhay*, 2 Phil. Ch. 774; *Tallmadge* v. *East River Bank*, 26 N. Y. (12 Smith) 105; *Coles* v. *Sims*, 5 DeG. Mc. & G. 1; 23 Eng. Law & Eq. 584, 590; *Whitney* v. *Union Railway Co.*, 11 Gray, 359. Thus, a covenant entered into between owners of adjoining city lots, for themselves and all claiming under them, to the effect that all buildings erected on such lots shall be set back a specified distance from the line of the street on which the lots front, is a covenant which equity will enforce between the parties to it, in favor of one against the other or in favor of and against any subsequent grantee of either lot. And a subsequent purchaser of a lot subject to such a covenant may be restrained from building in violation of the covenant. *Roberts* v. *Levy*, 3 Abb. N. S. (N. Y.) 311. See, also, *Mann* v. *Stephens*, 15 Sim. 377; *Rankin* v. *Huskisson*, 4 id. 13; *Clark* v. *Martin*, 49 Penn. St. 289. And where houses were set out in a regular plan and each purchaser of a house covenanted with the former owners of the whole not to erect any building in advance of the general line of frontage,—it was held, that a purchaser of one of such houses to whom the benefit of such covenants was assigned, was entitled to a mandatory injunction to com-

pel the purchaser of another house to pull down a bay window built in breach of such covenant, even without showing material damage. *Manners* v. *Johnson*, L. R., 1 Ch. Div. 673; 16 Eng. R. 690.

But if the complainant stands idly by, and permits the erection complained of to be made and expenses to be incurred therein, without objection, his application for an injunction comes too late and will not be entertained. *Water Lot Company* v. *Bucks*, 5 Ga. 315. And where a corporation, with power to prescribe the line of road within which future buildings should be erected, allowed the defendant to make some progress with the building of his church, which projected beyond the line afterward prescribed by the corporation, a motion for an injunction to compel him to put the walls back within the line was refused. *Corp. of Folkestone* v. *Woodward*, L. R., 15 Eq. 159; 5 Eng. R. 777.

§ 5. **Penalty, and liquidated damages.** See *ante*, 684, title 1, art. 1, § 6. The fact that the performance of covenants is secured by a penalty does not prevent the issuing of an injunction to avoid a breach thereof, but an injunction will generally be denied when the parties have, by agreement between themselves, fixed a sum as liquidated damages for such breach. *Shackle* v. *Baker*, 14 Ves. 469; *Coles* v. *Sims*, 5 DeG. Mc. & G. 1; 23 Eng. Law & Eq. 584. Thus, where in a covenant to keep secret the principles of a particular invention, the parties fix the amount of damages therein at a specified sum, the party complaining of a breach of the covenant cannot have an injunction restraining the other party from disclosing the secret. The damages being settled and liquidated in the covenant, the party must be left to pursue his remedy by action upon the covenant for the damages. *Nessle* v. *Reese*, 19 Abb. (N. Y.) 240; S. C., 29 How. 382.

§ 6. **Affirmative and negative covenants.** Where a contract contains covenants to do certain acts, and also other covenants to abstain from doing certain other acts, the breach of the negative covenants may be restrained by injunction, although there may be no jurisdiction to compel the specific performance of the affirmative covenants. *Lumley* v. *Wagner*, 13 Eng. Law & Eq. 252; S. C., 1 DeG. M. & G. 604; *Catt* v. *Tourle*, L. R., 4 Ch. App. 654. By enjoining the violation of a negative contract a court of equity in effect decrees its specific performance. Id.; *Stiff* v. *Cassell*, 2 Jur. (N. S.) 348. Thus, where an author contracts to write for a publisher and covenants that he will not write for any other during the continuance of his agreement, another publisher may be enjoined from employing him, and the performance of the contract be thus enforced. Id. So, an author who has sold the copyright of a work, with an express covenant not to publish any other work to prejudice the sale of it, may be enjoined from doing so. *Bar-*

field v. *Nicholson*, 2 Sim. & Stu. 1. And a court of equity will frequently grant injunctions in the nature of a specific performance to restrain the violation by a tenant of covenants contained in his lease. See *ante*, 682, § 3. Thus, an injunction was granted to restrain the tenant of a farm from breaking up meadow land, contrary to express covenant, for the purpose of building. *De Wilton* v. *Saxon*, 6 Ves. 106. See, also, *Barret* v. *Blagrave*, 5 id. 555. And where the lessee has covenanted not to carry on any trade or business upon the premises leased, he will be enjoined from using the premises for school purposes. *Kemp* v. *Sober*, 1 Sim. (N. S.) 520.

But a court of equity will decline to interfere where the negative covenants cannot be beneficially enforced, as where the contract contains covenants to abstain from doing certain acts to the injury of the plaintiff, and the question, whether the plaintiffs had sustained injury must be determined by a trial; or, whether the enforcement of the negative covenants would work injustice, as in a case where the consideration for the negative covenant of the one party is the affirmative covenant of the other party, which latter the court cannot enforce. *Hills* v. *Croll*, 2 Phil. Ch. 60; *Catt* v. *Tourle*, L. R., 4 Ch. App. 654. Yet the negative clause is enforced where justice and equity require it. Id. And see *Peto* v. *Brighton, etc., Railway Co.*, 1 Hem. & M. 468.

Where a party agrees not to do a particular act, and there are other terms in the agreement, which are so vague that the court cannot enforce them, it will not grant an injunction to restrain the breach of the negative term. *Kimberly* v. *Jennings*, 6 Sim. 340.

§ 7. **Waste.** The jurisdiction of English equity in cases of waste began with the injunction *pendente lite* (See 2 Story's Eq. Jur., § 911; 2 Broom & Had. Comm. 224, 225 [Wait's ed.]; 3 Bl. Comm. 227); but it has long since extended itself to cases where no action at law was pending, but where it was needed for the protection of trust estates and estates in reversion and remainder, and has now become one of the well defined branches of equity jurisprudence. *Farrant* v. *Lovel*, 3 Atk. 723; *Birch-Wolfe* v. *Birch*, L. R., 9 Eq. Cas. 683; *Denny* v. *Brunson*, 29 Penn. St. 382; *Dennett* v. *Dennett*, 43 N. H. 503. And an injunction to stay waste has become almost a matter of course. *Markham* v. *Howell*, 33 Ga. 508. It is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury, and it depends on much latitude of discretion in the court. *Kane* v. *Vanderburgh*, 1 Johns. Ch. 11.

It has been laid down as a general rule, that an injunction to stay waste is never granted against a defendant in possession, and claiming

by title adverse to that of the plaintiff. *Pillsworth* v. *Hopton*, 6 Ves. 51; *Nevitt* v. *Gillespie*, 1 How. (Miss.) 108; *Lansing* v. *North River Steamboat Co.*, 7 Johns. Ch. 162. And see *Bogey* v. *Shute*, 4 Jones' (N. C.) Eq. 174. But see *Earl Talbot* v. *Scott*, 4 Kay & J. 96; *Haigh* v. *Jagger*, 2 Coll. 231; *Cornelius* v. *Post*, 1 Stockt. (N. J.) 196. So, to warrant the allowance of an injunction, it must be made to appear that the injury complained of will be destructive to the estate of inheritance, or productive of irreparable mischief. *Amelung* v. *Seekamp*, 9 Gill & J. (Md.) 468; *Poindexter* v. *Henderson*, Walk. (Miss.) 176. Mere allegations of irreparable injury will not suffice, but the facts which go to constitute such injury must be shown. *Bogey* v. *Shute*, 1 Jones' (N. C.) Eq. 180. And if the injury is such as will admit of full pecuniary compensation, and one for which satisfaction in damages may be had at law, an injunction will not be granted. *Cockey* v. *Carroll*, 4 Md. Ch. 344; *Cutting* v. *Carter*, 4 Hen. & M. (Va.) 424. Nor will an injunction be granted, when the right to the premises is in doubt, pending an action of ejectment at law. *Storm* v. *Mann*, 4 Johns. Ch. 21. See, also, *Thompson* v. *Williams*, 1 Jones' (N. C.) Eq. 176; *Brown* v. *Folwell*, 3 Halst. (N. J.) Ch. 593.

Threats to commit waste will authorize an injunction. *Campbell* v. *Allgood*, 17 Beav. 628; *Loudon* v. *Warfield*, 5 J. J. Marsh. (Ky.) 196. But the mere apprehension or belief that waste will be committed is not sufficient. *Hanson* v. *Gardiner*, 7 Ves. 307. Nor will equity interfere where the waste is trivial and of small extent (*Barry* v. *Barry*, 1 Jac. & W. 631), or where the person against whom relief is sought has stopped committing waste since the filing of the bill. Id.

If, however, an intention to commit further waste can be shown, the court will interfere, though the first acts of waste may have been of a trivial nature. *Doran* v. *Carroll*, 11 Ir. Ch. 383; *Livingston* v. *Reynolds*, 26 Wend. 115. But where waste of one kind has been done or threatened, the injunction will not be extended to waste of another kind. *Coffin* v. *Coffin*, Jac. 72; Kerr on Injunction, 236.

Due diligence should be observed in making the application for an injunction against waste. *Barry* v. *Barry*, 1 Jac. & W. 631. See, also, *Denn* v. *Driver*, 1 N. J. Law, 107; *Bagot* v. *Bagot*, 32 Beav. 509. But in some cases delay is not material; as where a man has been permitted to cut down half of the trees upon the land of another, he can acquire no title from the negligence of the owner to cut down the remaining half. *Attorney-General* v. *Eastlake*, 11 Hare, 228. And tenants who have been in the habit of cutting turf or working quarries for a number of years acquire no title against their landlord to continue to do so. *Lord Courtown* v. *Ward*, 1 Sch. & Lef. 8. And see

Cregan v. *Cullen*, 16 Ir. Ch. 339. But in the case of mines the utmost promptitude in making the application is requisite. *Clegg* v. *Edmondson*, 8 DeG. M. & G. 808; *Norway* v. *Rowe*, 19 Ves. 159.

Persons who have removed timber from lands can be compelled to account for that taken, and, under very special circumstances, can be enjoined from removing the part on the lands already cut. *Porch* v. *Fries*, 18 N. J. Eq. 204; *Watson* v. *Hunter*, 5 Johns. Ch. 169. And see *Ware* v. *Ware*, 6 N. J. Eq. (2 Halst.) 117. But see *Van Wyck* v. *Alliger*, 6 Barb. 507, 514. And equity may, in its discretion, enjoin the cutting down and removing of large quantities of timber, where no action is pending. *Kane* v. *Vanderburgh*, 1 Johns. Ch. 11. And merely sending a surveyor to mark the trees preparatory to cutting them is sufficient ground for an injunction. *Jackson* v. *Cator*, 5 Ves. 688. But an injunction against the cutting of timber will not be granted, unless it appears that the trees have a peculiar value, or are of great importance to the estate, as that they are fruit or ornamental trees, or if timber and wood, that the enjoyment of the estate would be so affected by their destruction as to make the alleged damage irreparable. *Green* v. *Keen*, 4 Md. 98. Nor will one who is in possession of land under a contract of purchase be restrained from committing waste by cutting timber upon the land, unless he does so to such an extent as to render the land an inadequate security for the unpaid purchase-money. *Van Wyck* v. *Alliger*, 6 Barb. 507. But see *Cook* v. *Doolittle*, 5 Hun (N. Y.), 342.

An injunction may be granted at the suit of a mortgagee, to prevent the removal from the mortgaged premises of timber trees, cut down in waste of the security before the service of the injunction, where the person against whom relief must be sought for the waste committed is insolvent, or where no redress can be obtained at law, or in equity, if the removal is permitted, or where there is fraud. *Bank of Chenango* v. *Cox*, 26 N. J. Eq. 452. But where the bill alleges neither of such considerations, and prays an account from the person who has committed the waste, an injunction will not be granted. Id.

The cutting of such timber as may be necessary for repairs and the cultivation of the land will not be enjoined. *Duvall* v. *Waters*, 1 Bland (Md.), 569. And it is held to be a question for the jury whether trees have been cut down in good faith for the purpose of repairs. *Doe* v. *Wilson*, 11 East, 56. And whether the cutting of trees and timber in any case is a permanent injury to the freehold or inheritance, or not, is held to be necessarily a question of fact for the jury, or the court, when the action is tried by the court, without a jury. *McCay* v. *Wait*, 51 Barb. 225. See *Hickman* v. *Irvine*, 3 Dana (Ky.), 121.

The object of the remedy by injunction, being to prevent a known and certain injury, is applicable to every species of waste. *Hawley* v. *Clowes*, 2 Johns. Ch. 122. An injunction will, therefore, be granted to restrain equitable waste, which is defined to consist of such acts as at law would not be esteemed to be waste under the circumstances of the case, but which, in the view of a court of equity, are so esteemed, from their manifest injury to the inheritance. 2 Story's Eq. Jur., § 915. Or, equitable waste is otherwise defined to be that which a prudent man would not do in the management of his own affairs (*Turner* v. *Wright*, 2 DeG. F. & J. 234); and so an act may amount to equitable waste although there is a total absence of malice. Id. And see *Aston* v. *Aston*, 1 Ves. Sr. 264. A court of equity considers the excessive use of the legal power incident to an estate "unimpeachable of waste" to be inequitable and unjust, and therefore controls it. *Marker* v. *Marker*, 9 Hare, 1, 17. Thus, if a tenant for life, without impeachment of waste, should pull down houses, or do other waste wantonly and maliciously, he would be restrained. *Abraham* v. *Babb*, Freem. Ch. 53; *Strathmore* v. *Bowes*, 2 Bro. C. C. 88. And the mere fact that he exercised the power in an unreasonable manner, and against conscience, is sufficient to warrant the interference of the court by injunction. *Aston* v. *Aston*, 1 Ves. Sr. 264. So, the assignee of the tenant for life without impeachment of waste will be restrained. *Clement* v. *Wheeler*, 25 N. H. 361.

Although a tenant for life "without impeachment of waste," and a tenant in tail after possibility of issue extinct, may fell all the ordinary timber upon the estate, it has long been established, that a court of equity will restrain them from committing equitable waste, by felling timber planted or left standing for shelter or ornament (*Packington's Case*, 3 Atk. 215; *Chamberlyne* v. *Dummer*, 1 Bro. C. C. 166; *Halliwell* v. *Phillips*, 4 Jur. [N. S.] 608); even if planted by the tenant for life himself. *Coffin* v. *Coffin*, Jac. 71. What is ornamental timber, being merely a matter of taste, it is said that what was planted for ornament must be considered as ornamental. *Mahon* v. *Stanhope*, 3 Madd. 523, note. And the principle applicable to equitable waste has been extended to trees planted for the purpose of excluding objects from view. *Day* v. *Merry*, 16 Ves. 375. So, a tenant for life, without impeachment of waste, may be restrained from cutting down saplings not proper to be felled (*Coffin* v. *Coffin*, 6 Madd. 17); and from cutting underwood before it is of sufficient growth. *Brydges* v. *Stevens*, 6 id. 279.

Circumstances may, however, render the felling of ornamental timber justifiable, — as if it be so near to a house as to be prejudicial to its

healthfulness (see *Campbell* v. *Allgood*, 17 Beav. 623); but the burden of proof will lie upon the persons felling the timber. Id. So, the tenant may thin out ornamental trees without being liable as for waste. —— v. *Copley*, 3 Madd. 525, note. And see *Lushington* v. *Boldero*, 6 id. 149; *Bateman* v. *Hotchkin*, 31 Beav. 487. And where ornamental timber has been actually felled, and the reversioner claims damages from the tenant for life in respect of such equitable waste, the amount of damages can only be measured by the damage done to the inheritance. *Bubb* v. *Yelverton*, L. R., 10 Eq. 465.

Equity has undoubted jurisdiction to interfere by injunction, in favor of the owner of the reversion, to stay or prevent waste threatened or being committed by the tenant for life or years. And as a general rule, he only who has the remainder or reversion of the inheritance is entitled to such relief. *Loudon* v. *Warfield*, 5 J. J. Marsh. (Ky.) 196.

A tenant for life will not be enjoined from removing personal property unless good ground be shown that it is in danger of being removed. *Clagon* v. *Veasey*, 7 Ired. (N. C.) Eq. 175. See *Poertner* v. *Russell*, 33 Wis. 193. The fears and apprehensions of the remainderman are not sufficient to authorize the injunction, but the facts must be set forth, to enable the court to see that those fears and apprehensions are well founded. *Lehman* v. *Logan*, 7 Ired. (N. C.) Eq. 296. A tenant from year to year may be restrained from removing crops, manure, etc., where it is contrary to the custom of the country. *Onslow* v. ——, 16 Ves. 173; *Bonnell* v. *Allen*, 53 Ind. 130. And sowing the land with a pernicious crop is such waste as equity will enjoin. *Pratt* v. *Brett*, 2 Madd. 62.

An injunction will not be granted at the suit of the landlord against the tenant or his assigns, to restrain the commission of waste by the removal from the demised premises of a building erected by the tenant, if it appears that the landlord is not entitled to the reversion. *Perrine* v. *Marsden*, 34 Cal. 14.

And, as a general rule, equity will not interfere by injunction to prevent waste in cases of tenants in common, or coparceners, or joint-tenants, since they have a right to enjoy the estate as they please. *Hole* v. *Thomas*, 7 Ves. 589; *Hihn* v. *Peck*, 18 Cal. 640. Still, an injunction will be granted in special cases, as where the party committing the waste is insolvent (*Smallman* v. *Onions*, 3 Bro. C. C. 620); or to prevent one tenant in common, in possession, from cutting down timber growing on the land, and not wanted for the necessary use of the farm (*Hawley* v. *Clowes*, 2 Johns. Ch. 122); or where one of the parties occupies as a tenant to the other. *Twort* v. *Twort*, 16 Ves. 128. On a bill filed by one tenant in common of certain premises to restrain

a co-tenant from keeping a saloon and selling intoxicating liquor on the premises, where it was not alleged that the complainant suffered any special injury to his property, not suffered in common by the public, it was held, that an injunction could not be granted, and that, even if the complainant had suffered such injury, it should appear by the bill, to justify a court of equity to interfere by way of injunction, that the continuance of the injury was threatened and its danger imminent. *Oglesby Coal Co.* v. *Pasco*, 79 Ill. 164.

The commission of waste may be enjoined on behalf of one whose rights are only equitable. Thus, where the mortgagor in possession threatens waste which involves irreparable injury to the land, and will render the security *inadequate*, the mortgagee is entitled to an injunction against such waste (*King* v. *Smith*, 2 Hare, 244; *Ensign* v. *Colburn*, 11 Paige, 503; *Ackroyd* v. *Mitchell*, 3 L. T. [N. S.] 236; *Brown* v. *Stewart*, 1 Md. Ch. 87), even without averring or proving that the mortgagor is insolvent. *Fairbank* v. *Cudworth*, 33 Wis. 358. And if necessary the injunction will be allowed before the mortgage is due. *Salmon* v. *Clagett*, 3 Bland's (Md.) Ch. 125. The mortgagor in possession may, however, exercise all acts of ownership and may commit waste, provided he does not diminish the security or render it insufficient. *Kekewich* v. *Marker*, 3 Mac. & G. 329. Thus, he has the right to cut timber, and a court of equity will not interfere to restrain him in the exercise of that right, until it is made to appear to the court that he is cutting to an extent calculated to render the land an incompetent security for the amount due upon the mortgage. See *Van Wyck* v. *Alliger*, 6 Barb. 507, 511. But even in those States where the courts do not hold the mortgagee to be the owner of the fee, but treat the mortgage as a mere security for the debt, an injunction is nevertheless allowed to prevent a deterioration of that security. *Murdock's Case*, 2 Bland's (Md.) Ch. 461; *Cooper* v. *Davis*, 15 Conn. 561; *Nelson* v. *Pinegar*, 30 Ill. 473, 481; *Brady* v. *Waldron*, 2 Johns. Ch. 148.

And the commission of waste by the mortgagor in possession will be enjoined in equity even after forfeiture, and after the right to proceed at law has accrued. *Maryland* v. *Northern Central Railway*, 18 Md. 193. But it is otherwise if adequate damages can be recovered at law for the injury committed, and it is not made to appear that the defendants are insolvent. *Robinson* v. *Russell*, 24 Cal. 467.

The principles stated above as applicable to mortgages of real property also apply to mortgages of chattels. The mortgagee is not bound to take possession of the property by process at law, but may elect to prosecute his remedy in equity, and the debtor ought not to complain of being restrained from impairing the security which is held by his creditor. *Parsons* v. *Hughes*, 12 Md. 1.

So, the same principles which apply in cases of waste by a mortgagor in possession are also applicable as between the heir or executor of a debtor in possession and a judgment creditor. *Leake* v. *Beckett*, 1 Y. & J. 339. And as between a purchaser who has obtained possession before the payment of the purchase-moneys and the vendor. *Crockford* v. *Alexander*, 15 Ves. Jr. 138; *Webster* v. *Southeastern Railway Co.*, 1 Sim. (N. S.) 272. And see *Cook* v. *Doolittle*, 5 Hun (N. Y.), 342. So, where moneys due under a settlement are unpaid, the court has jurisdiction to prevent any waste which may tend to injure the security. *Turkington* v. *Kearnan*, Ll. & G. 45. An injunction will also lie in behalf of a devisee, and against the son of the testator, on the showing that the son is collecting the rents of the estate pending the question of the probate of the testator's will, and that waste is being committed by him. *Piatt* v. *Piatt*, 2 Disney (Ohio), 408.

But a mortgagor who has sold his equity of redemption, without taking any security as indemnity against his bond, cannot have an injunction to stay waste, against his vendee, on the ground that he will be answerable for what the land may fail to satisfy the mortgage. *Brumley* v. *Fanning*, 1 Johns. Ch. 501.

And where there is no claim of a right to commit waste, or any intention to commit it, or reason to apprehend such intention, an injunction ought not to be allowed merely because the tenant in possession did, at a previous time, commit waste. *Crockett* v. *Crockett*, 2 Ohio St. 180.

§ 8. **Trespass.** The jurisdiction of a court of equity to grant injunctions against trespass is comparatively of modern origin. In early times it was exercised only to restrain waste between parties holding privity of title, and the first case of injunction against a naked trespass, so far as we are informed, was that of *Flamany*, cited in 6 Ves. 147, 7 id. 308, and 8 id. 90. The relief in that case was based solely upon the irreparable injury that would result from a continuance of the trespass, and the same principle was afterward recognized and followed by Lord Eldon in *Mitchell* v. *Dors*, 6 Ves. 147. The principle has likewise been acknowledged in this country by repeated adjudications before the highest tribunals, and trespass will now be enjoined in all cases where, from the nature of the trespass, or the circumstances of the parties, the remedy at law cannot be full and adequate. *Livingston* v. *Livingston*, 6 Johns. Ch. 497; *Amelung* v. *Seekamp*, 9 Gill. & J. (Md.) 468; *Sullivan* v. *Hearden*, 11 Ga. 294; *Whitfield* v. *Rogers*, 26 Miss. 84; *Brooks* v. *Diaz*, 35 Ala. 599. Interference is based upon the assumption that all persons are entitled to be protected in the use, integrity and value of their property; and where courts of law cannot

give such protection, — whether because of the tardiness of the remedy, the peculiar nature of the property injured, the insolvency of the wrong-doer, or the plaintiff's inability to prove his damage, — equity must needs interfere, in order that justice be done, with her harsh, but indispensable process of injunction. *Moore* v. *Ferrell*, 1 Ga. 7, 10. See, also, *Musselman* v. *Marquis*, 1 Bush (Ky.), 463; *Webb* v. *Harp*, 38 Ga. 641; *Mooney* v. *Cooledge*, 30 Ark. 640; *Ryan* v. *Brown*, 18 Mich. 196; *Wirgel* v. *Walsh*, 45 Mo. 560; *Minnig's Appeal*, 82 Penn. St. 373; *Clark* v. *Jeffersonville, etc., R. R. Co.*, 44 Ind. 248. But in ordinary trespass, or where the courts of law can give a complete remedy, equity refuses to interfere. *Smith* v. *Smith*, 4 Jones' (N. C.) Eq. 303; *Cooper* v. *Hamilton*, 8 Blackf. (Ind.) 377; *Bracken* v. *Preston*, 1 Pinn. (Wis.) 365. To this rule there are, however, some exceptions, — a where a court of equity interposes on the ground of quieting possession and preventing a multiplicity of suits, although there be a remedy at law. *Coit* v. *Horn*, 1 Sandf. Ch. 1; *Nutbrown* v. *Thornton*, 10 Ves. 159; *Winslow* v. *Nayson*, 113 Mass. 412, 421. But to warrant interference in such cases, there must be sundry persons controverting the same right, and each standing upon his own pretensions; and the court will not interfere to restrain a person merely because he is guilty of a repetition of the same trespass, provided the case is abundantly susceptible of compensation in damages. *Hatcher* v. *Hampton*, 7 Ga. 49.

To give jurisdiction to a court of equity for the prevention of torts or injuries to property, two conditions must concur: *First*, the complainant's title must be admitted, or be established by a legal adjudication; and, *Second*, the threatened injury must be of such a nature as will cause irreparable damage, not susceptible of complete pecuniary compensation. *Gause* v. *Perkins*, 3 Jones' (N. C.) Eq. 177. See, also, *Jerome* v. *Ross*, 7 Johns. Ch. 315; *McMillan* v. *Ferrell*, 7 W. Va. 223; *Schurmeier* v. *St. Paul & Pacific Railroad Co.*, 8 Minn. 113; *Tribune Association* v. *The Sun*, 7 Hun (N. Y.), 175. Mere general averments of irreparable mischief is not enough, but the facts constituting such mischief should be set forth. *Carlisle* v. *Stevenson*, 3 Md. Ch. 499; *Waldron* v. *Marsh*, 5 Cal. 119. But it is a sufficient setting forth of the title and estate of the complainant if he alleges himself to be the owner in fee simple by purchase, and to be in possession. *Vanwinkle* v. *Curtis*, 2 Green's (N. J.) Ch. 422.

The power to grant an injunction to restrain the commission of a merely personal tort has been doubted. See *Kneedler* v. *Lane*, 3 Grant's (Penn.) Cas. 523. But an injunction lies to restrain the persistent commission of trespasses even of a mere personal nature, where

they affect a corporate franchise. *Stage Horse Cases*, 15 Abb. N. S. (N. Y.) 51. See *Davis* v. *Society for Prevention of Cruelty*, 16 id. 73.

If the trespass be fugitive and temporary, and adequate compensation can be had in an action at law, there is no ground to justify the granting of an injunction, and no decree should be made to be followed by injunction unless irreparable injury be clearly established. *Minnig's Appeal*, 82 Penn. St. 373; *James* v. *Dixon*, 20 Mo. 79; *Hodgman* v. *Richards*, 45 N. H. 28. Thus, an injunction will not be granted against a party for placing earth or other materials on another's land. The proper remedy in such case is an action of trespass. *Mulvany* v. *Kennedy*, 26 Penn. St. 44. So, on a bill for an injunction to restrain a stranger from taking rails from the owner's land, it was held that this was a case of ordinary trespass, and that the bill could not be sustained. *Cooper* v. *Hamilton*, 8 Blackf. (Ind.) 377.

But courts of equity are permitted greater latitude in restraining acts of trespass to mining property, since the injury goes to the immediate destruction of the minerals, thus impairing the very substance of the estate. It is therefore held, that, where the trespass consists in the removal of ore from the complainants' mines, the legal title being clearly established in the complainants, they are entitled to an injunction, even though an action at law would lie. *Anderson* v. *Harvey*, 10 Gratt. (Va.) 386; *Merced Mining Co.* v. *Fremont*, 7 Cal. 317. But the working of a mine will not be restrained by injunction, until the title, if disputed, has been settled at law, except in extreme cases. *Irwin* v. *Davidson*, 3 Ired. (N. C.) Eq. 311. See *West Point Iron Co.* v. *Reymert*, 45 N. Y. (6 Hand) 703; *Bracken* v. *Preston*, 1 Pinn. (Wis.) 584.

An injunction to restrain miners from working their mine so as to interfere with the ditch of another miner, was denied, where it appeared that the injunction would be ruinous to the defendants and of no benefit to the plaintiff. *Clark* v. *Willett*, 35 Cal. 534. See *Duke of Beaufort* v. *Morris*, 6 Hare, 340.

Turnpike or canal commissioners, or other similar officers, appointed under a private statute, may become trespassers by exceeding their authority, and may be restrained by injunction. *Belknap* v. *Belknap*, 2 Johns. Ch. 463. So, where the trespass obstructs a public highway which all persons are entitled to use, it becomes a nuisance of a character proper to be prevented by injunction. *Morris Canal, etc., Co.* v. *Fagan*, 18 N. J. Eq. 215. And an injunction may be granted against several persons who are united in committing a wrongful injury, where the particular acts done by each of them are kindred in character and effect. *Matsell* v. *Flanagan*, 2 Abb. N. S (N. Y.) 459.

But an injunction will not lie for a mere trespass or wrongful withholding of chattels levied on by a sheriff under a void execution, the remedy being entirely adequate by a suit at law. *Davidson* v. *Floyd*, 15 Fla. 667. It is only in cases where the chattel is of such peculiar quality, that the remedy at law by damages would be utterly inadequate and leave the party in a state of irremediable loss, that equity will interfere; as, where a thing is of peculiar value, as being ancient, or the production of some distinguished artist, or a family relic or ornament. *Bowes* v. *Hoeg*, 15 id. 403; 2 Story's Eq. Jur., § 709.

§ 9. **Nuisance.** The jurisdiction of courts of equity over nuisance was formerly exercised sparingly and with caution, but it is now fully established, and will be exercised as freely as in other cases in which the aid of the court is sought for the purpose of protecting legal rights from violation. See *Earl of Ripon* v. *Hobart*, 3 Myl. & K. 180. In cases of private nuisance, courts of equity have concurrent jurisdiction with courts of law (*Gardner* v. *Newburgh*, 2 Johns. Ch. 162); the interference of the former in any particular case being justified on the ground of restraining irreparable mischief, or of suppressing interminable litigation, or of preventing multiplicity of suits. 2 Story's Eq. Jur., § 925; *Burnham* v. *Kempton*, 44 N. H. 79; *Porter* v. *Witham*, 17 Me. 292. But a court of equity should be well satisfied of the existence of the nuisance before it interferes by injunction. And the doctrine of the English cases is, that the court will not, as a general rule, entertain jurisdiction to finally dispose of the case, where the right has not been previously established and is in any doubt, and the defendant disputes the right of the complainant or denies the fact of its violation. Under such circumstances the court will, ordinarily, do nothing more than preserve the property in its present condition, if that be necessary, until the question of right can be settled at law. *Elmhirst* v. *Spencer*, 2 Mac. & G. 45; *Broadbent* v. *Imperial Gas Co.*, 7 DeG. M. & G. 436; S. C. affirmed, 7 H. L. Cas. 600. See, also, *Arnold* v. *Klepper*, 24 Mo. 273; *McCord* v. *Iker*, 12 Ohio, 387; *Dunning* v. *Aurora*, 40 Ill. 481; *Mammoth Vein Coal Co.'s Appeal*, 54 Penn. St. 183. But the American courts have not enforced this rule in its strictness, and in some of the States it has been considerably relaxed. See 2 Story's Eq. Jur., § 925 d; *Campbell* v. *Seaman*, 63 N. Y. (18 Sick.) 582; 20 Am. Rep. 567; *Carlisle* v. *Cooper*, 21 N. J. Eq. 576; *Sprague* v. *Rhodes*, 4 R. I. 301. Thus it has been held that the mere denial of the complainant's right by the defendant in his answer will not oust the court of its jurisdiction by injunction. *Shields* v. *Arndt*, 3 Green's (N. J.) Ch. 235.

But the court will not interfere by injunction unless it appear that

the person aggrieved was without adequate remedy at law. *Parker* v. *Winnipiseogee, etc., Woollen Co.*, 2 Black (U. S.), 545; *Bean* v. *Coleman*, 44 N. H. 539. And the injury complained of must be shown to be irreparable and such as is not susceptible of pecuniary compensation. *Fort* v. *Groves*, 29 Md. 188; *Clowes* v. *Staffordshire Potteries, etc., Co.*, L. R., 8 Ch. App. 125; S. C., 4 Eng. R. 807. If the injury is of a trifling or merely nominal character, equity will not interfere. *Attorney-General* v. *Sheffield Gas Consumers Co.*, 3 DeG. M. & G. 304. The real question in all the cases is one of fact, whether the annoyance or inconvenience is such as materially to interfere with the ordinary comfort of human existence; or, in reference to property, whether the injury arising from the matters complained of is such as visibly to diminish the value of the property, and the comfort and enjoyment of it. See *Walker* v. *Brewster*, L. R., 5 Eq. 25; *Attorney-General* v. *Mid-Kent Railway Co., etc.*, L. R., 3 Ch. App. 100; *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. Cas. 642; S. C., 4 B. & S. 608; *Wolcott* v. *Melick*, 3 Stockt. (N. J.) 207; *Barnes* v. *Hathorn*, 54 Me. 124; *Wesson* v. *Washburn Iron Co.*, 13 Allen, 95; *Luscombe* v. *Steer*, 17 L. T. (N. S.) 229. Where the nuisance causes substantial and permanent damage to an individual, the court will not refuse an injunction, even though the act causing the nuisance may in its results be beneficial to the public. *Broadbent* v. *Imperial Gas Company*, 3 Jur. (N. S.) 221. And in determining whether relief ought to be granted, regard will be had, not only to the comfort and convenience of the occupier of the land for the time being, but to the prospective effect of the nuisance, in diminishing the value of land. *Goldsmid* v. *Improvement Commissioners*, L. R., 1 Ch. 349; S. C., 12 Jur. (N. S.) 308.

Relief will, however, be withheld, where the benefit to the public to be derived from the existence of the thing complained of outweighs the private inconvenience. *Attorney-General* v. *Perkins*, 2 Dev. (N. C.) Eq. 38. So, where either party may suffer, by the granting or withholding of an injunction, the rule in equity requires the court to balance the inconvenience likely to be incurred by the respective parties, by means of the action of the court, and to grant or withhold the injunction, according to a sound discretion. *Richard's Appeal*, 57 Penn. St. 105. Where an injunction might cause irreparable injury to the defendant, in the event of the plaintiff not being exclusively entitled, and the damages sustained by the plaintiff in the event of establishing his title allows of compensation, the injunction will be refused. Id. And see *Eastman* v. *Amoskeag Manuf. Co.*, 47 N. H. 71.

It is a general rule that every person may exercise exclusive dominion over his own property, and subject it to such uses as will best subserve

his private interests, provided he occasions no unnecessary damage or annoyance to his neighbor. But the maxim, *sic utere tuo ut alienum non lædas*, though it has a broad application, does not mean that one must never use his own so as to do any injury to his neighbor or his property. Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other. For these they are compensated by all the advantages of civilized society. If one lives in the city he must expect to suffer the dirt, smoke, noisome odors, noise and confusion incident to city life. *Campbell* v. *Seaman*, 63 N. Y. (18 Sick.) 568; S. C., 29 Am. Rep. 567. Or, as expressed in an English case, "if some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights, and sounds, and smells of a common seaport and ship-building town, which would drive the Dryads and their masters from their ancient solitudes". Lord Justice JANES, in *Salvin* v. *North Brancepeth Coal Co.*, L. R., 9 Ch. App. 705; S. C., 10 Eng. R. 685.

But any business, however lawful in itself, which, as to those residing in the neighborhood where it is carried on, causes annoyances that materially interfere with the ordinary physical comfort of human existence, is a nuisance that should be restrained. Thus, smoke, noise, and bad odors, even when not injurious to health, may severally constitute a nuisance that a court of equity will enjoin. *Crump* v. *Lambart*, L R., 3 Eq. 409. And the collection of a crowd of noisy and disorderly people, to the annoyance of the neighborhood, outside grounds in which entertainments with music and fireworks are being given for profit, is a nuisance for which the giver of the entertainments is liable to an injunction, even though he has excluded all improper characters from the grounds, and the amusements within the grounds have been conducted in an orderly way, to the satisfaction of the police. *Walker* v. *Brewster*, L. R., 5 Eq. 25. So an injunction has been granted against the ringing of bells in such a way as to annoy a neighboring resident. *Soltau* v. *DeHeld*, 2 Sim. (N. S.) 133; S. C., 9 Eng. Law & Eq. 104. And the owner of buildings which are jarred and shaken, to their injury and the annoyance of the occupants, by machinery run by steam power in an adjoining building, is entitled to protection by a judgment enjoining the occupant of such adjoining premises from so conducting his business as to injure such owner even though the alleged nuisance was erected and put in operation while the dwellings were under lease to the defendant, and the action was not commenced until after the termination of the lease. *McKeon* v. *See*, 4 Robt. (N. Y.) 449; S. C. affirmed, 51 N. Y. (6 Sick.) 300.

Where one manufacturing brick upon his lands uses a process in burning by which noxious gases are generated, which are borne by the winds upon the adjacent lands of his neighbor, injuring and destroying trees and vegetation, this is a nuisance, and the party injured is entitled to an injunction to restrain the use of the process complained of. *Campbell* v. *Seaman*, 63 N. Y. (18 Sick.) 568; S. C., 20 Am. Rep. 567. See, also, *Walter* v. *Selfe*, 4 De G. & S .315; *Cavey* v. *Ledbitter*, 13 C. B. (N. S.) 470; *Pollock* v. *Lester*, 11 Hare, 266; *Beardmore* v. *Tredwell*, 31 L. T. (N. S.) 893; *Hutchins* v. *Smith*, 63 Barb. 251; *Wier's Appeal*, 74 Penn. St. 230; *Mulligan* v. *Elias*, 12 Abb. (N. S.) 259. And it is immaterial that the injury is only occasional. It is sufficient to authorize an injunction that injury may be expected whenever a kiln is burning, unless the poisonous gases are blown away from the plaintiff's land. *Campbell* v. *Seaman*, 63 N. Y. (18 Sick.) 568; S. C., 20 Am. Rep. 567; *Ross* v. *Butler*, 19 N. J. Eq. 294. And it is no reason for refusing an injunction in such a case that the fumes tend to neutralize a malaria existing in the locality, or that the place is a manufacturing place, nor will relief be denied on the ground that the nuisance existed before the plaintiff acquired his property or built his house, at least, where there is not shown so long a continuance as to establish a prescriptive right. *Mulligan* v. *Elias*, 12 Abb. (N. S.) 259. It has, however, been held, that brick-making, being a useful and necessary employment, will not be restrained by injunction, although carried on in the outskirts of a city, because it occasions some discomfort or even some injury to those residing in the vicinity. *Huckenstine's Appeal*, 70 Penn. St. 102; S. C., 10 Am. Rep. 669. And see *Attorney-General* v. *Cleaver*, 18 Ves. 219.

It is usual and proper, where a building or works are being erected that can only be used for a purpose that is unlawful, to restrain the erection. But when it is not made to appear that the business for which the building is intended cannot possibly be carried on without becoming a nuisance, the injunction will be denied, and the defendant will be left at liberty to proceed with the erection of the building, at the risk of being restrained in the use of it, if a nuisance is ultimately created. *Cleveland* v. *Citizens' Gas-light Company*, 20 N. J. Eq. 201. And see *Cunningham* v. *Rice*, 28 Ga. 30; *Thebaut* v. *Canova*, 11 Fla. 143; *Barnes* v. *Calhoun*, 2 Ired. (N. C.) Eq. 199.

The jurisdiction of equity in cases of *purpresture*, as well as of public nuisances generally, is founded upon the necessity of preventing irreparable mischief and suppressing oppressive or vexatious litigation. *Attorney-General* v. *Johnson*, 2 Wils. Ch. 87; *Silliman* v. *Hudson River Bridge Co.*, 4 Blatchf. (C. C.) 395; *Columbus* v. *Jaques*, 30 Ga.

506. And a court of equity will not only interfere to restrain acts prejudicial to the interests of the community upon the information of the attorney-general (*Sparhawk* v. *Union Passenger Railway Co.*, 54 Penn. St. 401; *Manhattan, etc., Co.* v. *Barker*, 7 Rob. [N. Y.] 523); but also upon the application of private parties, directly affected by the nuisance, aside from and independent of the general injury to the public. Id.; *Frink* v. *Lawrence*, 20 Conn. 117; *Ewell* v. *Greenwood*, 26 Iowa, 377; *Beveridge* v. *Lacey*, 3 Rand. (Va.) 63; *Williams* v. *Smith*, 22 Wis. 594; *Robinson* v. *Baugh*, 31 Mich. 290. Thus, an injunction has been granted at the suit of an individual, against an obstruction of the highway (*Savannah, etc., Railroad Co.* v. *Shiels*, 33 Ga. 601; *Trenor* v. *Jackson*, 46 How. 389; S. C., 15 Abb. [N. S.] 115), and against the obstruction of a navigable river. *Mayor, etc., of New York* v. *Baumberger*, 7 Robt. (N. Y.) 219. So, an injunction has been granted at the suit of an abutting house-owner, to enjoin a street railroad company from leaving the snow, which it removes from its tracks, heaped up between them and the plaintiff's premises for a longer period than was reasonably requisite for its removal. *Prime* v. *Twenty-third St. R. R. Co.*, 1 Abb. N. C. (N. Y.) 63. See *Johnston* v. *Christopher & Tenth St. R. R. Co.*, 1 id. 75, note. But even in cases of unquestioned nuisance, if the party complaining shows no special injury to himself different from the common injury to the public, he is not entitled to an injunction. *Hinchman* v. *Paterson Horse Railroad Co.*, 17 N. J. Eq. 75; *Shed* v. *Hawthorne*, 3 Neb. 179. So, if the injury is doubtful and the evidence conflicting, it is not usual to grant the relief. *Earl of Ripon* v. *Hobart*, 3 Myl. & K. 169. See, also, *Sheboygan* v. *Sheboygan, etc., R. R. Co.*, 21 Wis. 667; *Lake View* v. *Letz*, 44 Ill. 81. And a *purpresture* or even a public nuisance cannot be predicated of the exercise of lawful authority. *Rex* v. *Pease*, 4 Barn. & Ad. 30; *Trenor* v. *Jackson*, 15 Abb. N. S. (N. Y.) 115; S. C., 46 How. 389. An injunction cannot therefore be granted upon the ground of nuisance, to restrain acts done in the lawful exercise of authority. *Masterson* v. *Short*, 33 How. (N. Y.) 481; S. C., 3 Abb. (N. S.) 154. But see *LeClercq* v. *Trustees of Gallipolis*, 7 Ohio, 218.

Equity will not interfere by injunction to restrain a public nuisance merely because it contravenes the general policy, in the absence of any violation of the private rights of property. An injunction will therefore be withheld against the perpetration of an act prohibited by public statute, where the only ground urged for the relief is that the act sought to be prohibited might diminish the profits of a trade or business pursued by the applicant in common with others. *Smith* v. *Lockwood*, 10 N. Y. Leg. Obs. 232; S. C., 13 Barb. 209.

Whenever it can be clearly proved that a burial place is so situated that interments there will endanger life or health by corrupting the surrounding atmosphere, or the water of wells or springs, equity will relieve by injunction. *Clark* v. *Lawrence*, 6 Jones' (N. C.) Eq. 83. See, also, *Barnes* v. *Hathorn*, 54 Me. 124. See Vol. 2, 132.

The general principles of equity, as they regard nuisances and their restraint, also apply to houses of ill-fame. And the continuance of such houses will be enjoined at the suit of private persons, who are deprived of the comfortable enjoyment of their property by the close proximity of such nuisance. *Hamilton* v. *Whitridge*, 11 Md. 128. So, an injunction will lie to restrain any nuisance that shocks the sense of decency, as the keeping and standing of jacks and stallions within the immediate view of one's dwelling. *Hayden* v. *Tucker*, 37 Mo. 214.

An authorized railroad in a city is not *per se* a nuisance, but when constructed without due authority of law, its construction may be restrained as a nuisance. *Bell* v. *Ohio, etc., R. R. Co.*, 25 Penn. St. 161; *Lexington, etc., R. R. Co.* v. *Applegate*, 8 Dana (Ky.), 289; *Wetmore* v. *Story*, 22 Barb. 414; S. C., 3 Abb. 262. It will not, however, be enjoined at the suit of one who owns no real estate over or adjoining which the road is to pass, and who will not be specially injured by its construction. *Davis* v. *Mayor, etc., of New York*, 14 N. Y. (4 Kern.) 506.

The control of a court of equity over nuisances being of a *preventive* character will not be interposed after the injury is done, unless the act constitutes a continuous nuisance, or to prevent its threatened repetition. *Peck* v. *Elder*, 3 Sandf. (N. Y.) 126; *Attorney-General* v. *New Jersey Railroad, etc., Co.*, 2 Green's (N. J.) Ch. 136. It is no defense to a bill to enjoin a nuisance caused by the manner in which a business is conducted in a neighborhood, that some of the complainants have establishments in the same vicinity to which similar objections lie, as are made to the one in question. *Robinson* v. *Baugh*, 31 Mich. 290. See *post*, title *Nuisance*.

§ 10. **Fixtures.** As a general rule, whenever a tenant attempts to remove from the freehold, after the expiration of his term, any chattel which, from its relation to the freehold, has become a fixture, such act may be restrained by injunction. See *Elwes* v. *Maw*, 3 East, 38; *ante*, 385, title *Fixtures*. So, where a mortgagor attempts to remove the fixtures from the mortgaged premises, he may be restrained, although no default has been made in the payments, and no part of the mortgage debt is due. Fixtures are embraced by a mortgage, and their removal tends to impair the mortgage security, and may be restrained as waste *Robinson* v. *Preswick*, 3 Edw. Ch. 246.

But to authorize an injunction to restrain the removal of chattels from the freehold in any case, it must be clear that they are what are technically termed fixtures. *Kimpton* v. *Eve*, 2 Ves. & B. 349.

§ 11. **Easements, light and air.** Under the common law of England, the owner of a dwelling has an absolute and indefeasible right to the enjoyment thereof, which will entitle him to restrain the erection of any building or obstruction on an adjoining lot, in such a manner as to darken his ancient lights or prevent the free access of air. *Back* v. *Stacy*, 2 Russ. Ch. 121; *Merchant Tailors' Co.* v. *Truscott*, 34 Eng. Law & Eq. 613; *Herz* v. *Union Bank of London*, 2 Griff. 686; *Hackett* v. *Baiss*, L. R., 20 Eq. Cas. 494; S. C., 15 Eng. R. 459. It is not, however, every deprivation of ancient lights that will authorize the interference by injunction. It must be shown that the obstruction of the light would cause a *material injury* to the comfort of those who occupy the house, or the relief will be withheld. *Attorney-General* v. *Nichol*, 16 Ves. 338; *Wilson* v. *Cohen*, Rice's (S. C.) Eq. 80. See *Barnett* v. *Johnson*, 2 McCart. (N. J.) 481; *Biddle* v. *Ash*, 2 Ashm. (Penn.) 211.

The English doctrine of sustaining a right to ancient lights and windows from twenty years' user does not prevail in this country. See Vol. 1, title *Ancient Lights.* And such user does not constitute sufficient ground for an injunction. See Vol. 1, p. 297. But see *Berkeley* v. *Smith*, 27 Gratt. (Va.) 892.

§ 12. **Support of land.** The general doctrine that where the lands of two owners adjoin upon the surface, each owner has a right that his land shall not be deprived of the support which it derived from the adjoining land, in its natural condition, has become firmly established in the law of England and of this country. See *Smart* v. *Morton*, 5 Ell. & Bl. 309; *Humphries* v. *Brogden*, 12 Q. B. 739; *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503; *Farrand* v. *Marshall*, 21 Barb. 410; 19 id. 380; *Gilmore* v. *Driscoll*, 122 Mass. 199. And a court of equity has power to restrain a land owner from excavating or removing soil from his land adjoining the land of another, if the effect of such excavation and removal will be to cause the land of his neighbor, by reason of the withdrawal of its lateral support, to fall away or subside. Id.; *Morrison* v. *Latimer*, 51 Ga. 519. And see *Richards* v. *Rose*, 9 Exch. 218.

But where the land endangered by such excavation does not remain in its natural state, but is the support of buildings that by their weight cause the land on which they rest to fall into the excavation of the owner of the adjoining property, no injunction can be properly granted restraining the act of such owner. *Lasala* v. *Holbrook*, 4 Paige, 169. See, also, *Mitchell* v. *Mayor, etc., of Rome*, 49 Ga. 19

S. C., 15 Am. Rep. 669. But see *Hunt* v. *Peake*, Johns. Ch. (Eng.) 705.

§ 13. **Party walls.** Although the adjacent proprietors own, in severalty, the portion of a party wall standing upon their respective lots, yet each has the easement of support by such wall so long as it stands, which the other may not weaken or destroy. *Nash* v. *Kemp*, 49 How. (N. Y.) 522; *Dowling* v. *Hennings*, 20 Md. 179; *Brown* v. *Windsor*, 1 Crompt. & J. 20. And such easement to support will be protected by injunction where the defendant's acts tend to the destruction of the right. Thus, the owner of one-half of an ancient solid party wall, long used for the support of buildings erected on each side of it, was enjoined from cutting away a portion of its face, and erecting a new wall upon his own land at a distance of two inches from that portion of the ancient wall which was left standing, and connected with it by occasional projecting bricks and ties. *Phillips* v. *Bordman*, 4 Allen, 147. So, it is held that where several houses belonging to the same owner are built together, so that each requires the mutual support of the other, and the owner parts with one of the houses, the right to such mutual support is not thereby lost, but may be enforced by an injunction restraining any act in any way interfering with or impairing such support. *Ogden* v. *Jones*, 2 Bosw. (N. Y.) 685; *Partridge* v. *Gilbert*, 3 Duer (N. Y.), 184; S. C. affirmed, 15 N. Y. (1 Smith) 601.

In Pennsylvania, a party wall must be a solid wall without openings, of brick or stone, or other incombustible material. And where the owner of a lot erected a party wall with windows in it, such wall was held to be a nuisance and to be within the restraining powers of equity. *Vollmer's Appeal*, 61 Penn. St. 118. See *Hart* v. *Kucher*, 5 Serg. & R. 1.

A party wall can only become such by statute or agreement or prescription. And merely building a wall by one of two adjacent owners, and placing the same in equal proportions on each lot, does not make it a party wall in the absence of any contract to that effect. *List* v. *Hornbrook*, 2 W. Va. 346; Washb. Easm. & Serv. 548.

But every wall of separation between two buildings is *presumed* to be a common or party wall, if the contrary be not shown. *Campbell* v. *Mesier*, 4 Johns. Ch. 334. See *ante*, Vol. 2, title *Easements*.

§ 14. **Water privileges.** An injunction will be granted in a proper case for the protection of an easement or servitude in water. And an easement in water acquired by prescription is as absolute as any other right, and equity will restrain its violation, when such violation is productive of serious injury. *Hulme* v. *Shreve*, 3 Green's (N. J.) Ch. 116.

But whenever the right is doubtful, or needs the investigation of a jury, upon facts in dispute, a court of equity is always reluctant to interpose its summary authority in such cases; for it is rather the duty of the court to protect *acknowledged rights*, than to establish new and doubtful ones. *Roath* v. *Driscoll*, 20 Conn. 533. See, also, *Bliss* v. *Kennedy*, 43 Ill. 67; *Woodruff* v. *Lockerby*, 8 Wis. 369. So, one who by his own acts acquiesces in the use of water in a particular manner, will be estopped from afterward enjoining its use in that manner. *Heilman* v. *Union Canal Co.*, 37 Penn. St. 100; *Jacox* v. *Clark*, Walk. (Mich.) 249.

§ 15. **Surface water.** The doctrine of dominant and servient heritage of the civil law respecting the natural flow of surface water has been adopted in some of the American States. This doctrine is, that the owner of the upper or dominant estate has a natural easement or servitude in the lower or servient one, to discharge all waters falling or accumulating upon his land, which is higher, upon or over the land of the servient owner, as in a state of nature; and that such natural flow or passage of the water cannot be interrupted or prevented by the servient owner to the detriment or injury of the estate of the dominant or any other proprietor. *Laumier* v. *Francis*, 23 Mo. 181; *Livingston* v. *McDonald*, 21 Iowa, 160; *Gillham* v. *Madison County Railroad Co.*, 49 Ill. 484; *Butler* v. *Peck*, 16 Ohio St. 334; *Kauffman* v. *Griesemer*, 26 Penn. St. 407. But the doctrine of the common law is, that there exists no such natural easement or servitude in favor of the owner of the superior or higher ground or fields as to mere surface water, or such as falls or accumulates by rain or the melting of snow; and that the proprietor of the inferior or lower tenement or estate may, if he choose, lawfully obstruct or hinder the natural flow of such water thereon, and in so doing may turn the same back upon or off on to or over the lands of other proprietors, without liability for injuries ensuing from such obstruction or diversion. *Chatfield* v. *Wilson*, 28 Vt. 49; *Dickinson* v. *Worcester*, 7 Allen, 19; *Greeley* v. *Maine, etc., Railroad Co.*, 53 Me. 200; *Bowlsby* v. *Speer*, 31 N. J. Law, 351; *Swett* v. *Cutts*, 50 N. H. 439; 9 Am. Rep. 276. But the owner of land on which there is a pond or reservoir of surface water cannot lawfully discharge it through an artificial channel directly upon the land of another, greatly to his injury. See *Curtiss* v. *Ayrault*, 47 N. Y. (2 Sick.) 73; *Miller* v. *Lanbach*, 47 Penn. St. 154; *Smith* v. *Fletcher*, L. R., 7 Exch. 305; 3 Eng. R. 305. Nor has a municipal corporation any greater power than natural persons in this respect, except through an exercise of the right of eminent domain. And where the injury from such discharge would be permanent, it will be restrained by in-

junction. *Pettigrew* v. *Village of Evansville*, 25 Wis. 223; S. C., 3 Am. Rep. 50.

A distinction is made between a "water-course" and the flow of surface waters. A water-course is a stream usually flowing in a particular direction, in a definite channel, and discharging into some other stream or body of water (see *Gillett* v. *Johnson*, 30 Conn. 180; *Ashley* v. *Wolcott*, 11 Cush. 192; *Broadbent* v. *Ramsbotham*, 11 Exch. 602); and the term does not include surface water conveyed from a higher to a lower level for limited periods during the melting of snow, or during or soon after the fall of rain, through hollows or ravines which at other times are dry. *Hoyt* v. *City of Hudson*, 27 Wis. 656; S. C., 9 Am. Rep. 473. Courts of equity have concurrent jurisdiction with courts of law, in a case of private nuisance, by diverting or obstructing an ancient water-course, and may issue an injunction to prevent the interruption, even though the plaintiff has not established his title at law. *Gardner* v. *Trustees of Newburgh*, 2 Johns. Ch. 162; *Norris* v. *Hill*, 1 Mich. 202. And it is held, that where a wrong has already been committed by the diversion of a stream from its natural channel, a mandatory injunction will be granted at the suit of a party aggrieved, to compel the restoration of the running water to its natural channel. *Corning* v. *Troy Iron and Nail Factory*, 40 N. Y. (1 Hand) 191. But where there is a mere fugitive and temporary diversion of water, without damage, and without pretense of right, equity will not interfere, by way of injunction. *Webb* v. *Portland Manf. Co.*, 3 Sumn. (C. C.) 189. See, also, *Embrey* v. *Owen*, 6 Exch. 353.

Nor will a court of equity grant an injunction to restrain a public work, carried on under authority of the legislature, on the ground that the plaintiff will sustain indirect or consequential damage therefrom, as the partial destruction of a water-power by the narrowing of the area of the pond by the embankment of a railroad, and the choking of the springs beneath the embankment by which such pond was fed. *Barnes* v. *South Side Railroad Co.*, 2 Abb. N. S. (N. Y.) 415.

An injury to the purity or quality of the water, to the detriment of other riparian owners, constitutes, in legal effect, a wrong and an invasion of private right, in like manner as a permanent obstruction or diversion of the water. It tends directly to impair and destroy the use of the stream by others for reasonable and proper purposes, and the party injured is therefore entitled to protection by injunction. *Holsman* v. *Boiling Spring Bleaching Co.*, 1 McCart. (N. J.) 335; *Merrifield* v. *Lombard*, 13 Allen, 16; *Goldsmid* v. *Tunbridge Wells Improvemen Co.*, L. R., 1 Eq. Cas. 161. See *post*, title *Water-course*.

§ 16. **Subterranean water, springs, etc.** As it regards subterranean water not flowing in any definite channel, nor flowing at all in the ordinary sense, but oozing through the soil according to the quantity of rain that may chance to fall, the owner of the soil may deal with it as he pleases, and turn it wholly to his own use. *Chasemore* v. *Richards*, 7 H. L. Cas. 349; *Village of Delhi* v. *Youmans*, 50 Barb. 316; S. C. affirmed, 45 N. Y. (6 Hand) 362; S. C., 6 Am. Rep. 100; *Buffum* v. *Harris*, 5 R. I. 243; *Frazier* v. *Brown*, 12 Ohio St. 294; *Clark* v. *Conroe*, 38 Vt. 469; *New River Co.* v. *Johnson*, 2 El. & El. 435; *Greenleaf* v. *Francis*, 18 Pick. 117. But see *Bassett* v. *Salisbury Manuf. Co.*, 43 N. H. 569. Where, however, subterranean springs have a known and well-defined channel, with a regular and constant flow of water, the law of surface streams applies, and any interruption or diversion thereof may be restrained by injunction. *Haldeman* v. *Bruckhart*, 45 Penn. St. 514; *Dudden* v. *Guardians of the Poor*, 1 H. & N. 627; *Grand Junction Canal Co.* v. *Shugar*, L. R., 6 Ch. App. 483. So, an injunction may be had to restrain a land-owner from negligently and maliciously cutting off or diverting the supply of a neighbor's spring or well without any purpose or usefulness to himself. *Wheatley* v. *Baugh*, 25 Penn. St. 528; *Swett* v. *Cutts*, 50 N. H. 439, 447; S. C., 9 Am. Rep. 276; *Roath* v. *Driscoll*, 20 Conn. 533; *Parker* v. *Boston & Maine R. R. Co.*, 3 Cush. 107. But see *Chatfield* v. *Wilson*, 28 Vt. 49.

One who, being the owner of three houses, the drainage from two of which passes through a drain pipe under the third to the street sewer, sells and conveys such two without any reservation or provision as to the drainage, thereby conveys an easement in such drain, and may be restrained by injunction from interfering therewith. *Hamel* v. *Griffith*, 49 How. (N. Y.) 305.

§ 17. **Littoral rights on navigable streams.** See *ante*, Vol. 1, title *Boundaries*. A State may authorize obstructions in its navigable waters. *Cobb* v. *Smith*, 16 Wis. 661; *Flanagan* v. *Philadelphia*, 42 Penn. St. 231. But highways, whether by land or water, are designed for the accommodation of the public, for travel or transportation, and any *unauthorized* or unreasonable obstruction thereof is a public nuisance in the eye of the law. They cannot be made the receptacles of waste materials, filth, or trash, nor the depositories of material of any description, so as unreasonably to obstruct their use as highways. *Gerrish* v. *Brown*, 51 Me. 256; *Commonwealth* v. *Temple*, 14 Gray, 69; *State of Pennsylvania* v. *Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 518. The authors of all obstructions to the free navigation of public rivers are liable, at common law, to indictment.

Gates v. *Blincoe*, 2 Dana (Ky.), 158; *Rex* v. *Ward*, 4 Ad. & El. 384. Or, the nuisance may be abated; the remedy by abatement being in all respects concurrent with that by indictment. *Knox* v. *Chaloner*, 42 Me. 150; *Mills* v. *Hall*, 9 Wend. 315. And it is now well settled that a court of equity will interfere by injunction in a proper case, until the slower process by indictment can be put in motion. *Rowe* v. *Granite Bridge Corp.*, 21 Pick. 344; *Georgetown* v. *Alexandria Canal Co.*, 12 Peters (U. S.), 91; *Attorney-General* v. *Cleaver*, 18 Ves. 211. But see *Attorney-General* v. *New Jersey, etc.*, *Railroad Co.*, 2 Green (N. J.), 136. But in case of a public nuisance by the obstruction of a navigable stream, a private person asking relief by way of prevention must aver and prove some *special injury*. *Mohawk Bridge Co.* v. *Utica, etc.*, *R. R. Co.*, 6 Paige, 554; *Crowder* v. *Tinkler*, 19 Ves. 616. And see *ante*, 703, § 9.

§ 18. **Littoral rights on unnavigable streams.** See *ante*, Vol. 1, title *Boundaries*. Riparian proprietors of an unnavigable river or private stream are entitled to the use and enjoyment of the stream without diminution or alteration, and will be protected by injunction from a violation of their right. *Society for Establishing Useful Manufactures* v. *Low*, 2 C. E. Green (N. J.), 19. And see *Hetruch* v. *Deachler*, 6 Penn. St. 32; *Clinton* v. *Myers*, 46 N. Y. (1 Sick.) 511; 7 Am. Rep. 373; *Thurber* v. *Martin*, 2 Gray, 394. Where mills are erected on both banks of a stream, the mill owners are each entitled to an equal share of the water. And if the owner of the mills on either side attempts to deprive the other of the use of his share of the water, of which he has been in the quiet enjoyment, and thus to destroy his mills, a preliminary injunction will be granted, since the injury might be irreparable. *Arthur* v. *Case*, 1 Paige, 447; S. C. affirmed, 3 Wend. 632; *Robinson* v. *Lord Byron*, 1 Bro. C. C. 588. But it is held, that the complainant must first establish his rights, and a violation of those rights, in a court of law. *Bliss* v. *Kennedy*, 43 Ill. 67. And where the testimony consists only of the opinions of witnesses, and in which there is a great contrariety of opinion, the court will not, on such evidence, make the injunction perpetual. *Woodruff* v. *Lockerby*, 8 Wis. 369. See, also, *Patten* v. *Marden*, 14 Wis. 473; *Shreve* v. *Voorhees*, 2 Green's (N. J.) Ch. 25.

§ 19. **Fisheries.** See *ante*, 366, title *Fisheries*, art. 3, § 5.

§ 20. **Agreements, acquiescence.** Where the rights and relations of different parties to the use of water are clearly fixed by contract, an injunction may be obtained to restrain any act of either party in violation of the contract, without considering the question of the probable damage or benefit resulting to the plaintiff from the change. *Adams*

v. *Barney*, 25 Vt. 225; *Corning* v. *Troy Iron and Nail Factory*, 40 N. Y. (1 Hand) 191; *Dickenson* v. *Canal Co.*, 19 Eng. Law & Eq. 287.

But if it appear that the plaintiff has for a long time slept on his rights, and delayed application for the relief to which he was otherwise entitled, an injunction will be refused, at least until the rights of the parties have been established by an action at law. *Wood* v. *Sutcliffe*, 8 Eng. Law & Eq. 217. And especially, where the defendants have incurred expense in the acts complained of, with the knowledge of the plaintiff and without objection on his part. *Water Lot Company* v. *Bucks*, 5 Ga. 315; *Payne* v. *Paddock*, Walk. (Mich.) 487. Thus, an injunction to restrain a canal company from using the water of a certain creek, the right of which belonged to the complainant, was refused, where it appeared that more than twenty years the company had used the water, with the assent of the plaintiff and those under whom he claimed, and that they had received compensation therefor. *Heilman* v. *Union Canal Company*, 37 Penn. St. 100. And see *Blanchard* v. *Doering*, 23 Wis. 200.

§ 21. **Interference by injunction.** Interference by injunction arises from the necessity of a prompt preventive remedy against an act that must, from the nature of the case, result in great and immediate injury. And, except in cases where there are substantial doubts, the court will not require that the rights of the parties should be first determined by a court of law. See *ante*, 710, § 14; *Corning* v. *Troy Iron and Nail Factory*, 40 N. Y. (1 Hand) 191, 207; *Norris* v. *Hill*, 1 Mich. 202, 211; *Berkley* v. *Smith*, 27 Gratt. (Va.) 892.

ARTICLE II.

PERSONAL PROPERTY.

Section 1. Transfer of negotiable and other instruments. If there is danger that a negotiable instrument fraudulently, or improperly or illegally obtained, or which ought not to be negotiated, will get into the hands of a *bona fide* holder without notice, and for a valuable consideration, to the prejudice of the maker or acceptor, or persons interested in it, a court of equity will interfere by injunction to restrain the negotiation, assignment, or indorsement of the instrument, and will order it to be delivered up. *Smith* v. *Haytwell*, Ambler, 66; *Green* v. *Pledger*, 3 Hare, 165; *Simons* v. *Cridland*, 5 L. T. (N. S.) 523; *James* v. *Roberts*, 18 Ohio, 548; Kerr on Injunct. 595. Thus an injunction will be granted to enjoin the transfer of notes obtained by

gross fraud (*Bishop of Winchester* v. *Fournier*, 2 Ves. Sr. 445; *Maitland* v. *Backhouse*, 16 Sim. 58. See, also, *Globe Mutual Ins. Co.* v. *Reals*, 50 How. 237), or restrain the transfer of notes given for money lost at play (*Lord Portarlington* v. *Soulby*, 3 Myl. & K. 104), or given by a partner for his individual debt but in the firm name and without the knowledge or consent of his copartners, and with full knowledge of such fact by the taker. *Jervis* v. *White*, 7 Ves. 413. And undue influence used in obtaining a note will warrant an injunction against its collection. *Espey* v. *Lake*, 10 Hare, 260; *Rembert* v. *Brown*, 17 Ala. 667. So, where notes have been unjustly and inequitably extorted from the complainant by force of a judicial process, issued in violation of an express agreement, such notes being without consideration in fact or in law, the payee may be enjoined from putting them in circulation by assignment or otherwise. *Thurman* v. *Burt*, 53 Ill. 129.

And where a check is made and denvered to a person for a specific purpose, and is transferred by him to a third person on account of a prior indebtedness instead of for the purpose designed by the maker, the holder of the check may be restrained from negotiating it, by an injunction obtained at the instance of the maker. *Clark* v. *Gallagher*, 20 How. (N. Y.) 308. And see *Atlantic De Laine Company* v. *Tredick*, 5 R. I. 171.

Even a *bona fide* holder of a bill of exchange, which has been negotiated by means of a forgery of the name of the payee as indorser, will be restrained from suing the acceptor upon it, and the court will direct the instrument to be delivered up and canceled. *Esdaile* v. *La Nauze*, 1 Y. & Coll. 394. But in no case will persons be enjoined from the payment of notes who are not made parties to the suit, and an injunction granted against such persons will be dissolved by reason of the non-joinder. *Fellows* v. *Fellows*, 4 Johns. Ch. 25.

§ 2. **Transfer of stocks.** A court of equity will interfere by injunction to restrain the transfer of stock fraudulently issued to an amount far in excess of the capital of a corporation that has become insolvent, where the false and genuine certificates are precisely similar upon their face, and the further transfer would increase the difficulties of tracing the genuine certificates of stock. *People* v. *Parker Vein Coal Co.*, 10 How. (N. Y.) 186; S. C. affirmed, id. 543. And see *Underwood* v. *New York, etc., R. R. Co.*, 17 How. (N. Y.) 537; *Fisk* v. *Chicago, etc., R. R. Co.*, 53 Barb. 568.

An agent for a State who is authorized to borrow money upon a sale of its stocks cannot, without express authority from such State, sell such stocks on credit. And where an agent has made such an

unauthorized sale of negotiable stocks for less than par value to a purchaser who has notice of the agent's want of authority, the State may repudiate the sale, and restrain the purchaser from disposing of the stocks, or the proceeds thereof, by injunction. *State of Illinois* v. *Delafield*, 8 Paige, 527; 26 Wend. 192; 2 Hill, 161. And see *Mechanics' Bank* v. *New York, etc., R. R. Co.*, 13 N. Y. (3 Kern.) 599.

And where an agent invests his funds and those of his principal indiscriminately in stocks, an injunction may issue to restrain a transfer of any portion until the respective stocks can each be determined and distinguished. *Lord Chedworth* v. *Edwards*, 8 Ves. 46.

§ 3. **Contested probate.** Where a controversy exists respecting the title to stock under different wills, an injunction will be granted to restrain any transfer *pendente lite*. *King* v. *King*, 6 Ves. 172; *Osborn* v. *Bank of United States*, 9 Wheat. 845. So, if there is a controversy as to who are the proper representatives the court will interfere, as of course, on the ground that there is no proper person to receive the assets. *Watkins* v. *Brent*, 1 Myl. & Cr. 102. But where a probate or letters of administration had been previously granted, the court looks into the case to see whether, upon the whole, such a case is made as justifies the interference of the court. Id.

§ 4. **Specific chattels.** Where a personal chattel possesses a peculiar value as an article of curiosity, antiquity, or is a family heirloom or relic to which the *pretium affectionis* applies, and for the loss of which no compensation in damages can afford an adequate redress, a court of equity will grant an injunction restraining the party wrongfully in possession from further detaining, injuring or disposing of such chattel. *Duke of Somerset* v. *Cookson*, 3 P. Wms. 390; *Lady Arundell* v. *Phipps*, 10 Ves. 140; *Lowther* v. *Lord Lowther*, 13 id. 95; *Tonnins* v. *Prout*, 1 Dick. 387. But where the chattel is not of this character, and its loss or injury may be compensated in damages, or it can be easily replaced, equity will not decree its restoration *Bowes* v. *Hoeg*, 15 Fla. 403), although the party in possession may be restrained from disposing of it or otherwise defeating the remedy at law. *Hunt* v. *Mootry*, 10 How. (N. Y.) 478; *Hardwick* v. *Forbes*, 1 Bibb (Ky.), 212.

§ 5. **In aid of action to recover possession of personal property.** The plaintiff, in an action for the recovery of the possession of personal property, may obtain, in addition to the remedy afforded at law, an injunction restraining the wrongful disposition of the subject of the action.

Thus, in New York, an injunction has been granted restraining the

defendant in replevin from interfering with, transferring or incumbering the property which forms the subject-matter of the litigation, pending the action, even where the character of the property was not such as to give it any peculiar or extraordinary value. *Erpstein* v. *Berg*, 13 How. 91; *Furniss* v. *Brown*, 8 id. 59.

§ 6. **Protection of mortgaged chattels.** A mortgagor of chattels will be protected by injunction, in the possession of his mortgaged property, until default in payment or condition broken. *Ford* v. *Ransom*, 8 Abb. (N. S.) 416; S. C., 39 How. 429. See Vol. 2, *Chattel Mortgage.*

ARTICLE III.

POSSESSION OR REMOVAL OF PROPERTY.

Section 1. In general. After judgment and execution at law against a debtor, but not before, a court of equity will, in a proper case, grant an injunction to restrain the defendant from disposing of his property. *Wiggins* v. *Armstrong*, 2 Johns. Ch. 144; *Mittnight* v. *Smith*, 17 N. J. Eq. 259.

And the only ground on which injunctions are granted against third persons in possession of personal property, and ostensibly its rightful owners, upon *ex parte* applications, is for the protection of the fund or property, when shown to be in danger without this interposition. *Thayer* v. *Swift*, Harr. (Mich.) 430.

Where the creditors of an absent debtor had obtained an attachment against his goods, and a brother of the debtor, to whom the property had been fraudulently conveyed, was disposing of the same, and preventing the creditors from seizing it under the attachment,—it was held, that the creditors had a lien under the attachment which could be enforced by an injunction restraining the brother from disposing of the property and removing it out of the jurisdiction of the court. *Falconer* v. *Freeman*, 4 Sandf. Ch. 565.

ARTICLE IV.

TITLE AND EVIDENCES AS TO PROPERTY.

Section 1. In general. Whenever a spurious deed or instrument, valid on its face, and capable of a vexatious use after the means of defense are lost or impaired, or is in any way calculated to throw a

cloud upon the title, is outstanding, a court of equity will entertain a suit to compel its delivery and cancellation; and it will also grant an injunction restraining any proceedings based upon, or transfer of such instrument before judgment. *New York, etc., R. R. Co.* v. *Schuyler*, 17 N. Y. (3 Smith) 592, 599. See, also, *McHenry* v. *Hazard*, 45 N. Y. (6 Hand) 580; *Globe Mutual Life Ins. Co.* v. *Reals*, 50 How. (N. Y.) 237.

ARTICLE V.

TAKING OF PRIVATE PROPERTY.

Section 1. Taxes. As a general rule equity will not interfere to restrain a tax solely upon the ground that the tax is illegal. But there must be in addition some special circumstances, bringing the case within some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, would throw a cloud upon the title of the complainant. *Dows* v. *City of Chicago*, 11 Wall. 108; *Clarke* v. *Ganz*, 21 Minn. 387; *Blessing* v. *Galveston*, 42 Tex. 641; *Barrow* v. *Davis*, 46 Mo. 394; *McDonald* v. *Murphree*, 45 Miss. 705; *Savings, etc., Society* v. *Austin*, 46 Cal. 415; *Heywood* v. *City of Buffalo*, 14 N. Y. (4 Kern.) 534; *State Railroad Tax Cases*, 92 U. S. (2 Otto) 575, 613. Where a power to levy a tax exists, and the property is subject to taxation, a party aggrieved by any errors or irregularities in the assessment will, in general, be left to his appropriate legal remedy. *West* v. *Ballard*, 32 Wis. 168; *Linton* v. *Mayor, etc., of Athens*, 53 Ga. 588; *Greene* v. *Mumford*, 5 R. I. 472; *Clinton School District's Appeal*, 56 Penn. St. 315.

But an injunction will lie to restrain the collection of taxes assessed without the authority of law. *Riley* v. *Western Union Telegraph Co.*, 47 Ind. 511; *Ottawa* v. *Walker*, 21 Ill. 610. And where he has no adequate remedy at law, a tax-paying property holder has a right, in his own name, to resort to equity to restrain by injunction a municipal corporation and its officers from illegally creating debts which will increase his burden of taxation. *Hodyman* v. *Chicago & St. Paul R. R. Co.*, 20 Minn. 48. See, also, *Kinyon* v. *Duchene*, 21 Mich. 498; *Supervisors* v. *Webster*, 53 Ill. 141. So, the collection of a tax has been restrained on the ground of its unconstitutionality, where there was no adequate remedy at law. *Foote* v. *Linck*, 5 McLean, 616. And see *Knowlton* v. *Supervisors, etc.*, 9 Wis. 410. But in general the

unconstitutionality of the act will not warrant interference by injunction. *Morgan* v. *Graham*, 1 Woods, 124; *Exchange Bank of Columbus* v. *Hines*, 3 Ohio St. 1.

An injunction will be allowed to restrain the collection of an excessive tax, where it appears that the taxing officers have fraudulently assessed the property of an individual above its value, and relatively above the other assessments on the roll, with a view to impose upon him more than his just proportion of taxation. *Merrill* v. *Humphrey*, 24 Mich. 170. See, also, *Cleghorn* v. *Postlewaite*, 43 Ill. 428. And the relief has been allowed against the enforcement of a tax imposed for the payment of judgments obtained through fraud and collusion. *Newcomb* v. *Horton*, 18 Wis. 566. So, the relief has been allowed to restrain a tax-deed from issuing, where the sale was the result of a combination between the collector and the principal bidders, to prevent competition. *Gage* v. *Graham*, 57 Ill. 144. So, if the remedy at law against a tax collector for collecting an illegal tax, or for any tax in an illegal manner, be rendered impossible or incomplete by reason of any special fact in the case,—as for example, the insolvency of the tax collector—an injunction lies to restrain him. *Richardson* v. *Scott*, 47 Miss. 237. In general, however, courts of equity will assume jurisdiction to restrain the collection of taxes only in the following cases: Where officers exceed their power and levy, when, under the law, they can levy no such tax, because the tax is not authorized; or, where the persons attempting to make the levy are not officers *de jure* or *de facto*; or, where the tax is levied on property wholly exempt; or where the law under which it is levied violates the rule of uniformity, and is, therefore, unconstitutional. *Nunda* v. *Chrystal Lake*, 79 Ill. 311. See, also, *Porter* v. *Rockford, etc., R. R. Co.*, 76 id. 561.

Taxation, by State authority, of the capital stock of a national bank, invested in United States securities, has been restrained. *First National Bank of Omaha* v. *Douglass Co.*, 3 Dill. 298. And where no remedy exists to recover back illegal State taxes when paid into the treasury, a United States circuit court sitting in equity will restrain their collection, the plaintiff being otherwise without adequate remedy at law; and equity, having jurisdiction in such a case, will determine the validity of county as well as the State taxes, embraced in the same collection warrant and levy. Id.

The rule that equity will not interfere to restrain by injunction the collection of taxes, simply because of irregularities in the tax proceedings, is applicable alike to general and special taxes, and whether the application be to restrain a sale or enjoin the execution of a deed. *Challiss* v. *Commissioners of Atchison County*, 15 Kans. 49. And

where a party concedes the justness of a portion of his tax, but disputes another portion on the ground that it is illegal, he is not entitled to the interference of equity to stay the execution of process, unless he pays or offers to pay the legal part. *Palmer* v. *Township of Napoleon*, 16 Mich. 176; *Mills* v. *Johnson*, 17 Wis. 598. And see *Howes* v. *Racine*, 21 Wis. 514; *Commissioners* v. *Elston*, 32 Ind. 27; S. C., 2 Am. Rep. 327. And the bill itself must show what portion of the tax is legal and what illegal, in order that the court may properly discriminate between them. *Taylor* v. *Thompson*, 42 Ill. 10; *Parmley* v. *St. Louis, etc., R. R. Co.*, 3 Dill. 25; *Tallassee Manuf. Co.* v. *Spigener*, 49 Ala. 262.

It is held to be the settled law in Missouri, that in order to prevent illegal action on the part of municipalities, tending to increased taxation, the State, through the attorney-general or circuit attorney, or any tax payer of the municipality, may institute a proceeding for an injunction. *Matthis* v. *Town of Cameron*, 62 Mo. 504.

§ 2. **Taking public property for private use.** Courts of equity have jurisdiction to restrain any purpresture or unauthorized appropriation of the public property to private uses, which may amount to a public nuisance or may injuriously affect or endanger the public interest. *Attorney-General* v. *Cohoes Company*, 6 Paige, 133. Thus, the unauthorized erection of a crib or pier in a public harbor is a purpresture and a nuisance which will be restrained by injunction at the suit of the attorney-general. *People* v. *Vanderbilt*, 28 N. Y. (1 Tiff.) 396. And see *DeLaney* v. *Blizzard*, 7 Hun (N. Y.), 7; *Hoeft* v. *Seaman*, 6 Jones & Sp. (N. Y.) 62. So, cutting through the embankment of a public canal, with the avowed intention of drawing water therefrom for the supply of mills, is a purpresture and will be restrained. *Attorney-General* v. *Cohoes Company*, 6 Paige, 133. And in the case of a proposed structure which would hinder navigation, it is of no avail for the defendant to urge that the benefit to the public counterbalances the inconvenience. *Rex* v. *Ward*, 4 Ad. & El. 386. But slight inconveniences and occasional interruptions in the use of a highway or navigable stream, which are temporary and reasonable, are not illegal merely because the public may not, for the time, have the full use of the highway or stream, and they will not therefore be restrained by an injunction. *People* v. *Horton*, 64 N. Y. (19 Sick.) 610.

§ 3. **Taking private property for public use.** The propriety of taking private property for a public use is not a judicial question, but one of political sovereignty to be determined by the legislature, either directly or by delegating the power to public agents, proceeding in such

form and manner as it may prescribe. *People* v. *Smith*, 21 N. Y. (7 Smith) 595; *Matter of Fowler*, 53 N. Y. (8 Sick.) 60. And the power to appropriate private property to a public use being vested solely in the legislature, any assumption of such authority by any inferior power is unauthorized and may be restrained by injunction. *People* v. *Hudson River R. R. Co.*, 2 Abb. N. S. (N. Y.) 249. See, also, *Bloomfield, etc., Gas-light Co.* v. *Calkins*, 62 N. Y. (17 Sick.) 386.

So, where the rights of the citizen are about to be invaded by the appropriation of his land for a public use, without compensation for the damage, or without compliance with the requirements of the law, an injunction will be granted restraining the threatened appropriation. *Floyd* v. *Turner*, 23 Tex. 292; *Anderson* v. *Commissioners of Hamilton Co.*, 12 Ohio St. 635.

ARTICLE VI.

ROADS, RAILROADS, CANALS, BRIDGES, FERRIES AND WHARVES.

Section 1. Roads. The appropriation of land for the use of a highway is for a specific purpose, and the public thereby acquire a mere right of passage, with the powers and privileges which are incident to such a right. The fee of the land still remains in the owner, and he does not become divested of the title because the public have a free and unrestrained right to the use of the same for the purpose of traveling, passing and repassing, on foot or with animals and vehicles, with the privilege of doing all necessary acts to keep the same in repair. The owner's right is absolute to use and enjoy the soil, reap any profit arising therefrom, and to use the highway for his individual purposes in any way consistent with the easement of servitude which its appropriation for a road warrants. *Bloomfield, etc., Gas-light Co.* v. *Calkins*, 62 N. Y. (17 Sick.) 386. See, also, *Smith* v. *City of Leavenworth*, 15 Kan. 81. And no distinction exists in these respects between the streets in a city and a highway in the country. *Sherman* v. *McKeon*, 38 N. Y. (11 Tiff.) 266.

Resort is frequently had to courts of equity for the protection of the reserved rights of the owner of the fee in public streets and highways, and also to protect the rights of the public in the enjoyment of the easement resulting from long use or dedication. Thus, a road supervisor will be restrained at the instance of a land-owner from removing trees standing in the highway adjacent to, and in front of, such owner's premises, unless such removal is demanded by the wants of public travel

and convenience. *Bills* v. *Belknap*, 36 Iowa, 583. On the other hand, the obstruction of a public street or highway may be restrained by injunction. *Langsdale* v. *Bonton*, 12 Ind. 467; *Pettibone* v. *Hamilton*, 40 Wis. 402; *Hall* v. *McLeod*, 2 Metc. (Ky.) 98. No usage, however long continued, will justify an encroachment upon a public highway (*State* v. *Pierson*, 37 N. J. Law, 216;) but, to be remedied by injunction, such encroachment must be really an obstruction to its free use (*Philadelphia's Appeal*, 78 Penn. St. 33), and the obstruction must be of a permanent character. *King* v. *Ward*, 4 Ad. & El. 384; *People* v. *Horton*, 64 N. Y. (19 Sick.) 610, 620.

§ 2. **Railroads.** The restraining power of a court of equity is frequently invoked for the protection of private rights against the encroachments of railroad corporations. Thus, if a railroad company is about to take permanent possession of lands of an individual, without a legal determination in some legal method, of the sum to be paid the owner therefor, or without payment or tender of such sum, the owner is entitled to an injunction restraining the company therefrom. *Diedrichs* v. *Northwestern, etc., R. R. Co.*, 33 Wis. 219. See, also, *Harness* v. *Chesapeake, etc., Canal Co.*, 1 Md. Ch. 248; *Commissioners, etc.*, v. *Durham*, 43 Ill. 86; *Sidener* v. *Norristown, etc., R. R. Co.*, 23 Ind. 623; *Bohlman* v. *Green Bay, etc., Railway Co.*, 40 Wis. 157. And in cases of this kind it has been held, that courts of equity may interfere without reference to the question whether the injury complained of is irreparable in its nature. *Western Md. R. R. Co.* v. *Owings*, 15 Md. 199. But if a mode of obtaining damages for property taken for the use and construction of a railway has been provided by statute, and the owner of land neglects to avail himself of this mode of relief, he will not be permitted to enjoin the construction of the road because of the non-payment of damages. *New Albany, etc., R. R. Co.* v. *Connelly*, 7 Ind. 32. See, also, *Nichols* v. *City of Salem*, 14 Gray, 490. And the right to relief by injunction may be lost by delay in making application for the remedy. And where a party stands by, and silently sees a public railroad constructed upon his land, it is too late for him, after the road is completed, or large sums have been expended on the faith of his apparent acquiescence, to seek by injunction, or otherwise, to deny to the railroad company the right to use the property. The work being completed, the public, as well as those directly interested in the road, as stockholders and creditors, have a right to insist on the application of the rule that he who will not speak when he should will not be allowed to speak when he would. There only remains to him a right of compensation. *Goodin* v. *Cincinnati, etc., R. R. Co.*, 18 Ohio St. 169. And see *Hentz* v. *Long Island, etc., R. R. Co.*, 13 Barb. 646;

Erie Railway Co. v. *Delaware etc., R. R. Co.*, 6 C. E. Green (N. J.), 283.

Where the fee of streets is in the city where they are located, the city having the power to control and regulate their use, a court of equity will not, at the suit of an individual, enjoin a railway company from operating its road laid in the street without the permission of the city, but will leave the redress to the public authorities. *Patterson* v. *Chicago, etc., R. R. Co.*, 75 Ill. 588. See, also, *Dunham* v. *Williams*, 37 N. Y. (10 Tiff.) 251; *People* v. *Kerr*, 27 N. Y. (13 Smith) 188; S. C., 25 How. 258. But the laying of a railway track over land which has been merely *dedicated* to the public use for streets, will be enjoined, at the suit of the owner of the fee, on the ground that the use of the streets for such unauthorized purpose is a special injury to him. *Schurmeier* v. *St. Paul, etc., R. R. Co.*, 10 Minn. 82.

The construction of a railroad in a city is not *per se* a nuisance, and the laying of its track along a public street will not be enjoined on that ground. *New Albany, etc., R. R. Co.* v. *O'Daily*, 12 Ind. 551. But it has been held, that when the construction of a railroad, in a crowded city, is commenced without due authority of law, it is not only a public nuisance, but such a nuisance as the tax payers and property owners along the streets have a right to restrain by injunction, on the ground of special injury in obstructing ingress and egress to and from their places of business. *Hamilton* v. *New York, etc., R. R. Co.*, 9 Paige, 171; *People* v. *Third Avenue R. R. Co.*, 45 Barb. 63; S. C., 30 How. 121. So, an unauthorized extension of a road already completed may be enjoined on the same ground. Id. An injunction will likewise lie at the suit of a single individual to restrain the construction and operation of a railroad on a public street where the power to build such road is derived from an invalid contract. *Coleman* v. *Second Avenue R. R. Co.*, 38 N. Y. (11 Tiff.) 201.

A railway company may be enjoined at the suit of a bridge company who have a toll bridge across a stream, from permitting any violation of the bridge company's rights by the unauthorized use of the railroad bridge across the same stream. *Thompson* v. *New York, etc., R. R. Co.*, 3 Sandf. Ch. 625. So, a railroad corporation may be enjoined from running trains in violation of express agreements, and on this ground an injunction has been granted restraining a railroad corporation from allowing an express train to pass a certain station without stopping. *Lindsay* v. *Great Northern R. R. Co.*, 19 Eng. Law & Eq. 87. And an injunction will be granted to restrain the construction of a railroad through a farm, where the railroad company fail to make a suitable and necessary "farm crossing" or a reasonable compensation

therefor. *Wheeler* v. *Rochester, etc., R. R. Co.*, 12 Barb. 227. See *Wademan* v. *Albany, etc., R. R. Co.*, 51 N. Y. (6 Sick.) 568; *Smith* v. *New York, etc., R. R. Co.*, 63 N. Y. (18 Sick.) 58.

An injunction will lie in favor of a railroad corporation to restrain highway commissioners from taking possession of the site of an engine-house, etc., necessary for the use of the corporation, and from opening a highway over the same. *Albany, etc., R. R. Co.* v. *Brownell*, 24 N. Y. (10 Smith) 345. And where a railroad corporation had a right of way over a certain strip of land, and a party was about to erect a flouring mill so near the track as not to leave sufficient room for its construction and repair, an injunction was granted restraining the erection of the mill. *Cunningham* v. *Rome R. R. Co.*, 27 Ga. 499. So where the owner of land lying between the main highway and a railroad station made a written offer to permit the company to build a road connecting such highway with the station, upon certain terms and conditions, which conditions the company substantially performed, an injunction was granted restraining any obstruction of such road, although the agreement to fulfill the conditions imposed was never signed by the company. *New York & New Haven R. R. Co.* v. *Pixley*, 19 Barb. 428. See *post*, title *Railroads*.

§ 3. **Canals.** Any interference with the rights of a canal company to the water necessary to the purposes for which it was chartered will be protected by injunction. *Rochdale Canal Co.* v. *King*, 21 Eng. Law & Eq. 177; *Morris Canal Co.* v. *Society, etc.*, 1 Halst. (N. J.) Ch. 203. Thus, a party entitled to a water power supplied from a public canal, cannot define and limit by his own acts the rights of the canal company to the use of the water, and he will be restrained by a perpetual injunction from so doing. *Erie Canal Co.* v. *Walker*, 29 Penn. St. 170. And a canal company, which is entitled to all the waters of a creek with which to supply its canal, will not be enjoined from increasing the height of a dam merely because a mill-owner below the dam is thereby deprived of water for the use of his mill. *Spangler's Appeal*, 64 id. 387. Nor will a court of equity attempt to control by injunction the discretionary power of a board of canal commissioners in regulating the quantity of water necessary for the navigation of the canal, upon the complaint of individuals claiming an interest in the water. *Cooper* v. *Williams*, 4 Ohio, 253.

A canal company may, however, be compelled by injunction to perform its contracts, even where the proposed violation would not be injurious, but on the other hand beneficial to the other contracting party. *Dickenson* v. *Grand Junction Canal Co.*. 19 Eng. Law & Eq. 287. See *ante*, Vol. I, title *Canals*.

§ 4. **Bridges.** See *ante*, Vol. 1, title *Bridges*. A bridge constructed across navigable water may be so clearly a nuisance as to authorize a court of equity to restrain its continuance by an injunction. But as it can be a nuisance to those only who navigate the waters obstructed thereby, they alone are entitled to an injunction. *Fort Plain Bridge Co.* v. *Smith*, 30 N. Y. (3 Tiff.) 44, 63. See *Gilman* v. *Philadelphia*, 3 Wall. 713; *Hutchinson* v. *Thompson*, 9 Ohio, 52; *post*, title *Nuisance*.

So, the proprietors of a toll bridge must have a grant of an exclusive right to maintain their bridge and take toll, to be entitled to an injunction enjoining the opening of another bridge, within such distance as to greatly impair the profits of the first. *Fall* v. *County of Sutter*, 21 Cal. 237; *President, etc.*, v. *Trenton City Bridge Co.*, 2 Beasl. (N. J.) 46; *Fort Plain Bridge Co.* v. *Smith*, 30 N. Y. (3 Tiff.) 44, 63.

§ 5. **Ferries.** See *ante*, 345, title *Ferries*. The validity of a ferry franchise lies in its exclusiveness. The moment the right becomes common the franchise ceases to exist. *Conway* v. *Taylor's Executors*, 1 Black (U. S.), 634. And where the complainants can show no exclusive ferry privileges or franchise, they will not be allowed to enjoin the keeping of another ferry at the same place. *Butt* v. *Colbert*, 24 Tex. 355. And such exclusive privilege cannot be inferred. It should be expressed in the license or charter, and if not so expressed, it cannot be enforced. *McEwen* v. *Taylor*, 4 Greene (Iowa), 532. And see *Mayor, etc., of N. Y.* v. *N. Y., etc., Ferry Co.*, 49 How. 250.

So, the owner of a ferry franchise must have perfected his right thereto, by the performance of all the conditions precedent to its exercise as prescribed in the act granting it, and must be prepared to furnish the facilities designed to be secured by a ferry, before he can be entitled to an injunction restraining encroachments upon his franchise. *Walker* v. *Armstrong*, 2 Kan. 198. And when he claims rights under a lease from certain commissioners he must prove their corporate character and the lease, if these facts are denied in the answer. *Carter* v. *Garrett*, 13 Ala. 728.

And where one ferryman seeks to restrain the acts of another in diverting travel from his ferry he will fail in obtaining such relief, if it is established that he has been guilty of similar acts infringing on the rights of the defendant. *Hill* v. *Averett*, 27 Ala. 484. Nor is a party claiming an exclusive right to maintain a ferry within certain limits, entitled to an injunction against another person maintaining a ferry in violation of such alleged right, where the evidence discloses such inattention to the business and gross neglect on the complainant's part as would warrant the forfeiture of his rights in a proper proceeding for

that purpose. *Ferrel* v. *Woodward*, 20 Wis. 458. And private persons will not be enjoined at the suit of a ferry owner from using their own boats for passage or transportation of themselves, their families and property, the public generally not being thus accommodated. *Trent* v. *Cartersville Bridge Company*, 11 Leigh (Va.), 521.

§ 6. **Wharves.** The remedy of parties interested, against the abuse of wharf privileges, is by *mandamus*, to compel the proprietors of the franchise to provide adequate facilities of wharfage, or by injunction to restrain them from collecting fees for inadequate performance. *Prescott* v. *Burgess and Town Council of Duquesne*, 48 Penn. St. 118.

Where private owners of a pier have an exclusive right of wharfage, a municipal corporation cannot deprive them of this right by appropriating the slip adjoining the pier to the purposes of a public ferry. The corporation may be restrained by injunction from interfering with such exclusive rights. *Murray* v. *Sharp*, 1 Bosw. (N. Y.) 539.

And the courts will not only protect pier owners in the enjoyment of their property as against the encroachments of stationary obstructions to the ingress and egress to and from their property, but an injunction will be granted restraining the occupation of waters necessary to the proper enjoyment of their property, by floating vessels. *Penniman* v. *New York Balance Co.*, 13 How. (N. Y.) 40.

ARTICLE VII.

RESTRAINING ACTIONS OR SUITS.

Section 1. In general. Courts of equity interfere by injunction to restrain actions and proceedings at law upon the principle of preventing a legal right from being enforced in an inequitable manner or for an inequitable purpose; or, in other words, to prevent an unfair use being made of the process of a court of law, in order to deprive another party of his just rights. *Smithurst* v. *Edmunds*, 1 McCart. (N. J.) 408. But a man is not entitled to this relief, if he has a good defense at law (*Screw Mower, etc., Co.* v. *Mettler*, 26 N. J. Eq. 264; *Womack* v. *Powers*, 50 Ala. 5; *Savage* v. *Allen*, 54 N. Y. [9 Sick.] 458); and cannot show a good equitable case. *Harding* v. *Webster*, 1 Dr. & Sm. 101. The mere assertion of an equity is not sufficient. A case must be shown sufficient to satisfy the court that the question really involves an equitable element, and is a fit subject for investigation in a court of equity. Id.; *Dyke* v. *Taylor*, 3 De G., F. & J. 473. There must be some inequitable advan-

tage taken, which would render it unconscientious in the party obtaining it, to enforce the judgment, and of which the party seeking the aid of equity could not have availed himself at law, or was prevented from doing so by fraud or accident, or the act of the opposite party unmixed with any fraud or negligence on his part. *Richardson* v. *Mayor, etc., of Baltimore*, 8 Gill (Md.), 433. But the negligence or mistake of counsel in the progress or trial of a suit at law, in not making a defense that was available, cannot be relieved against in equity. *Fuller* v. *Little*, 69 Ill. 229; *Warner* v. *Conant*, 24 Vt. 351; *Graham* v. *Roberts*, 1 Head (Tenn.), 56. A judgment confessed by an attorney who is imperfectly acquainted with the facts, during the illness of his client, and of the counsel who has been specially retained to defend the cause, may, however, be enjoined if it appears that there was a good defense to the action. *Cheek* v. *Taylor*, 22 Ga. 127.

The process of injunction, when its object is to restrain proceedings at law, is addressed only to the individual, and not to the court. It neither assumes any superiority over the court, in which those proceedings are had, nor denies its jurisdiction. The jurisdiction of the legal tribunal is in fact admitted. *Hill* v. *Turner*, 1 Atk. 516. So, it is a rule not to interfere with the proceedings at law to a greater extent than is neccessary for the purposes of justice. *Bond* v. *Hopkins*, 1 Sch. & Lef. 431; *Slim* v. *Croucher*, 1 De G., F. & J. 528. And if the remedy at law is as perfect and complete as that in equity the action will not be restrained. *Fox* v. *Hill*, 2 De G. & J. 356; *Southampton Dock Co.* v. *Southampton Harbor and Pier Board*, L. R., 11 Eq. 254; *Norris* v. *Day*, 4 Y. & Col. 475. See *Bissell* v. *Beckwith*, 33 Conn. 357. And if the case is one which may be more satisfactorily tried at law, the action will of course be allowed to proceed. *Clarke* v. *Manning*, 7 Beav. 162. Nor will an injunction be granted merely on the ground that an action at law ought not to have been brought (*Cooper* v. *Joel*, 1 De G., F. & J. 240); nor because the defendant at law cannot make out his case. *Mangles* v. *Grand Dock Colliery Co.*, 10 Sim. 519; *Bishop of Chicago* v. *Chiniquy*, 74 Ill. 317. And one who seeks the assistance of equity to restrain by injunction proceedings at law, must be able to show that his own acts and dealings in the matter have been fair and consistent with equity. *Williams* v. *Roberts*, 8 Hare, 315; *Gibson* v. *Goldsmid*, 5 De G., M. & G. 757; *Dutton* v. *Furness*, 35 L. J. Ch. 463.

If there be delay in making application for the injunction until near the period of trial, the court may refuse to interfere, unless the delay is satisfactorily explained. *South Eastern Railway* v. *Brogden*, 3 Mac. & G. 22; *Lloyd* v. *Adams*, 4 K. & J. 470. So, delay may be

material as it affects the question of costs. Thus, one who permits the proceedings at law to run on, will be ordered, although successful in restraining the action, to pay the costs subsequent to the declaration. *Watson* v. *Allcock*, 4 De G., M. & G. 242. The terms on which an injunction is granted are in each case a question for the discretion of the court. But the general principle upon which the court proceeds is, to put the party applying, upon such terms as will enable the court to do justice to the party restrained, in the event of the former failing to make out his case at the hearing. *Sanxter* v. *Foster*, 1 Cr. & Ph. 302. See *Chilton* v. *Campbell*, 20 Beav. 531; *Waterlow* v. *Bacon*, L. R., 2 Eq. 514.

The injunction may be temporary or perpetual, total or partial, qualified or unconditional. 2 Story's Eq. Jur., § 873. And it is not confined to any one point of the proceedings at law. It may be granted to stay trial (*M'Fadden* v. *Jenkyns*, 1 Hare, 458); to restrain the entry of judgment (*Jones* v. *Hughes*, id. 383); to stay execution or proceedings under an execution (*Espey* v. *Lake*, 10 id. 260; *Grant* v. *Lathrop*, 23 N. H. 67); and pending an appeal. *Earl of Shrewsbury* v. *Trappes*, 2 De G., F. & J. 172. See, also, *Kenyon* v. *Clarke*, 2 R. I. 67; *Smyth* v. *Balch*, 40 N. H. 363; *Williams* v. *Sadler*, 4 Jones' (N. C.) Eq. 378; *Shaw* v. *Dwight*, 16 Barb. 536.

The general principle upon which relief will be given after verdict or judgment is, that any fact which clearly proves it against conscience to execute a judgment, and of which the injured party could not have availed himself at law, or of which he might have availed himself, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgment. *Marine Ins. Co.* v. *Hodgson*, 7 Cranch (U. S.), 336; *Truly* v. *Wanzer*, 5 How. (U. S.) 142; *Emerson* v. *Udall*, 13 Vt. 477; *Ocean Ins. Co.* v. *Field*, 2 Story, 59; *Ross* v. *Harper*, 99 Mass. 175; *Young* v. *Reynolds*, 4 Md. 375. In accordance with this principle relief will be given where material facts have been discovered since the trial at law, which were fraudulently concealed, or could not, by ordinary care and diligence, have been discovered before the trial. *Bateman* v. *Willac*, 1 Sch. & Lef. 204; *Williams* v. *Lee*, 3 Atk. 223. So relief will be given against a judgment which has been obtained by fraud or collusion. *Bargate* v. *Shortridge*, 5 H. L. 297; *Railroad Company* v. *Neal*, 1 Woods, 353. But an injunction will not issue to restrain proceedings on a judgment, on account of defenses which could have been made on the trial. *Jordon* v. *Corley*, 42 Tex. 284. Nor can one who suffers judgment to go

against him by neglect come to a court of equity for relief. *Lansing* v. *Eddy*, 1 Johns. Ch. 49; *Holmes* v. *Stateler*, 57 Ill. 209; *Slack* v. *Wood*, 9 Gratt (Va.) 40; *Williams* v. *Lee*, 3 Atk. 223. And if a party by failing to appeal, or by prosecuting an appeal in a defective or insufficient mode, loses his remedy at law, he cannot proceed in equity by injunction. *Long* v. *Smith*, 39 Tex. 160. See *ante*, 179, *Equity*.

§ 2. **Other actions in the same court.** Ordinarily an injunction will not be granted to enjoin the prosecution of a suit in the same court, whether the application is made by parties, privies, or a stranger to the original suit. Relief may be had by motion or petition in the principal cause. *Smith* v. *American Life Ins. & Trust Co.*, Clarke's (N. Y.) Ch. 307; *Fuentes* v. *Gaines*, 1 Woods, 112; *McReynolds* v. *Harshaw*, 2 Ired. (N. C.) Ch. 196; *Medlock* v. *Cogburn*, 1 Rich. (S. C.) Eq. 477. Still, in extreme cases, a court of equity has power, by injunction, to restrain proceedings in another equitable action in the same court. See *Sieveking* v. *Behrens*, 2 Myl. & Cr. 581; *Warington* v. *Wheatstone*, Jac. 202; *Basye* v. *Beard*, 12 B. Monr. (Ky.) 581; *Prudential Assurance Co.* v. *Thomas*, L. R., 3 Ch. App. 74. And in New York, the supreme court, in one judicial district in the State, has jurisdiction in an action brought for that purpose, to restrain, by injunction, proceedings in another action pending in that court, in another district. *Erie Railway Co.* v. *Ramsey*, 45 N. Y. (6 Hand) 637. See *Platt* v. *Woodruff*, 61 N. Y. (16 Sick.) 378; *Pfohl* v. *Simpson*, 50 How. 341; *Ely* v. *Lowenstein*, 9 Abb. (N. S.) 37. But see *Washington* v. *Emery*, 4 Jones' (N. C.) Eq. 29.

§ 3. **Proceedings in foreign courts.** The power of a court having general equitable jurisdiction to enjoin the parties to a suit pending before it from bringing an action against the adverse party, upon the same subject-matter, in a foreign court, has been acknowledged and exercised for a long period of time. See *Field* v. *Holbrook*, 14 How. (N. Y.) 103; S. C., 3 Abb. 377; *Great Falls Manuf. Co.* v. *Worster*, 23 N. H. 462; *Ex parte Tait*, L. R., 13 Eq. 311. And it is the duty of the court to exercise this power upon the presentation of a proper case, when it can be done consistently with the acknowledged practice in courts of equity. Id. In the execution of the power such courts do not proceed upon any claim of right to interfere with or control the course of proceedings in other tribunals, or to prevent them from adjudicating on the rights of parties when drawn into controversy and duly presented for their determination. But the jurisdiction is founded on the clear authority of courts of equity over persons within the limits of their jurisdiction and amenable to process, to re-

strain them from doing acts that will work an injury to others, and are, therefore, contrary to equity and good conscience. As the decree of the court is pointed solely at the party, and does not extend to the tribunal where the suit or proceeding is pending, it is wholly immaterial that the party is prosecuting his action in the courts of a foreign State or country. *Dehon* v. *Foster*, 4 Allen, 545. See, also, *Mead* v. *Merritt*, 2 Paige, 404; *Briggs* v. *French*, 1 Sumn. (C. C.) 504; *Massie* v. *Watts*, 6 Cranch, 158; *Carron Iron Co.* v. *Maclaren*, 5 H. L. Cas. 416, 445. An exception to this doctrine long recognized in this country is, that the State courts cannot enjoin proceedings in the courts of the United States (*Bryan* v. *Hickson*, 40 Ga. 405; *English* v. *Miller*, 2 Rich. [S. C.] Eq. 320; *Phelan* v. *Smith*, 8 Cal. 520; *Kendall* v. *Winsor*, 6 R. I. 453; *United States* v. *Keokuk*, 6 Wall. 514), nor the latter in the former courts. Ib. But see *Craft* v. *Lathrop*, 2 Wall. Jr. 103. So where parties commence proceedings in a State court, and in the course of litigation are enjoined from further action until certain matters are disposed of, it is a violation of the injunction order to institute proceedings in the United States court involving the matters enjoined; and the State court has power to punish the disobedience of its orders, although it cannot require the parties to dismiss their suit in the United States court. *Hines* v. *Rawson*, 40 Ga. 356; S. C., 2 Am. Rep. 581. And see *Akerly* v. *Vilas*, 15 Wis. 401.

§ 4. **Receivers and other officers.** A receiver may be restrained from prosecuting a vexatious and unjust suit at law, in the name and without the consent of a third person, by an injunction issued from the court by which he was appointed, and at the suit of persons not parties to the suit in which he was appointed. *Matter of Merritt* v. *Lyon*, 5 Paige, 125; S. C. affirmed, 16 Wend. 405. And where a court of equity directs a receiver to bring a suit at law in the name of another person, upon giving the usual indemnity, it will interfere by injunction to restrain the nominal plaintiff from discontinuing or releasing the action, or from applying to a court of law to stay the proceedings. The court will also, in its discretion, restrain third persons from instituting proceedings at law against its officers, acting under its direction, although the persons by whom such proceedings are instituted are not parties to the suit in that court. Id.

The proper mode of restraining a receiver is not by injunction issuing from another court of concurrent jurisdiction, but by application to the court whose officer he is, for instructions. *Winfield* v. *Bacon*, 24 Barb. 154.

§ 5. **Statutory foreclosure of mortgages.** In accordance with the familiar principle that a court of equity has power to restrain pro-

ceedings at law, where such proceedings must necessarily work injustice, it has been held that a prior mortgagee may be restrained by injunction from proceeding with a statute foreclosure instituted after a foreclosure commenced in equity by a junior mortgagee upon the same premises, where the prior mortgagee is made a party defendant in the latter proceedings. *Davis* v. *Briggs*, 3 How. (N. Y.) 65. But see *Bedell* v. *McClellan*, 11 id. 172; *Daily* v. *Kingon*, 41 id. 22.

§ 6. **Summary proceedings.** Summary proceedings to recover possession of land for non-payment of rent may be arrested by injunction. But to warrant an arrest of proceedings of this kind, there must be fraud, surprise, or undue advantage in the conduct of the proceedings. *Marry* v. *James*, 2 Daly (N. Y.), 437; S. C., 37 How. 52. A proceeding of this nature will be restrained where the party sought to be dispossessed has an equitable defense, of which the officer before whom the proceedings are had cannot take cognizance, or where the tenant has been deprived of an opportunity to make his defense. *McIntyre* v. *Hernandez*, 39 How. (N. Y.) 121; S. C., 7 Abb. (N. S.) 214. So, an injunction will be granted staying a warrant of dispossession where it appears that the defendant had not time to arrive at the court room before the hearing, after the service of the summons. *Griffith* v. *Brown*, 3 Rob. (N. Y.) 627; S. C., 28 How. 4. So, where the tenant brings an action against the landlord to compel the renewal of a lease, the latter may be restrained from evicting the former *pendente lite*. *Graham* v. *James*, 7 Rob. (N. Y.) 468. Likewise in an action by a tenant against the landlord to compel a specific performance of the covenant to repair, an injunction restraining summary proceedings may issue, on the ground of an inadequate remedy at law. *Valloton* v. *Seignett*, 2 Abb. 121. And see *Welz* v. *Niles*, 3 Daly (N. Y.), 172.

§ 7. **Trust funds, assets, etc.** Any party having a legal or equitable interest in the preservation of a trust fund may have an injunction restraining the trustees from disposing of or applying the fund in any manner contrary to the provisions of the instrument by which the trust was created. *Cranston* v. *Plumb*, 54 Barb. 59. So, any corporator is entitled to an injunction to restrain a municipal corporation from making an improper and illegal use of the public moneys where such acts will impose a special burden on his property. *Christopher* v. *Mayor, etc., of New York*, 13 Barb. 567; S. C., 5 Abb. 41. And see *Ely* v. *Connolly*, 7 Abb. (N. S.) 8.

An injunction may likewise issue to enjoin the distribution of assets to legatees by executors before the determination of a suit relative to the estate. *Mitchell* v. *Stewart*, 3 Abb. (N. S.) 250. An injunction may be obtained, also, restraining the transfer of merchandise, and the

proceeds of other merchandise already disposed of, under a fraudulent assignment. *Davis* v. *Grove*, 27 How. 70. So, an injunction has been granted restraining the further transfer of property from an old to a new company in which the old company has been merged, until the matters in dispute respecting the articles of consolidation have been determined. *Blatchford* v. *Ross*, 54 Barb. 42; S. C., 37 How. 110; 5 Abb. (N. S.) 434.

§ 8. **Staying enforcement of judgment or execution.** See *ante*, 727, § 1. All judgments, properly rendered by a court having jurisdiction of the cause and of the parties, are conclusive between those parties and their privies. *State* v. *Richmond*, 26 N. H. 232. If, however, the judgment of a court of common law, having general jurisdiction, be rendered by accident or mistake, or through fraud, or any fact exists which proves it to be against conscience to execute the judgment, of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud, accident or mistake, unmixed with any fault or negligence of himself or his agents, a court of equity may interfere by temporary or perpetual injunction to restrain the adverse party from availing himself of such a judgment. *Wingate* v. *Haywood*, 40 id. 437; *Clute* v. *Potter*, 37 Barb. 199; *Kent* v. *Ricards*, 3 Md. Ch. 392; *New York & Harlem R. R. Co.* v. *Haws*, 56 N. Y. (11 Sick.) 175; *Slack* v. *Wood*, 9 Gratt. (Va.) 40; *Ableman* v. *Roth*, 12 Wis. 81; *Gaines* v. *Hale*, 26 Ark. 168; *Bibb* v. *Hitchcock*, 49 Ala. 468; 20 Am. Rep. 288; *Dutil* v. *Pacheco*, 21 Cal. 438; *Simmons* v. *Martin*, 53 Ga. 620; *ante*, 179, *Equity*.

Where a judgment has been obtained by artifice or concealment on the part of the plaintiffs, and the court where the fraud has been perpetrated is not able to give relief, a court of equity will prevent the perpetrator of the fraud from using his judgment to the injury of his adversary, or if he has enforced his judgment, the court will hold him as a trustee, and compel him to account for what he has so received. So, the court will grant relief against the fraudulent use of a *bona fide* judgment,—as where the plaintiff has himself become the purchaser of the defendant's property at a grossly inadequate price, through some artifice or unconscionable contrivance. *Garlick* v. *McArthur*, 6 Wis. 450; *Mallory* v. *Norton*, 21 Barb. 424; *Tomkins* v. *Tomkins*, 3 Stockt. (N. J.) 512.

The enforcement of a *void* judgment may be perpetually enjoined, where such judgment appears to be valid and regular upon its face; and this is especially true where the judgment is also unjust. *Crafts* v. *Dexter*, 8 Ala. 767; *Ridgeway* v. *Bank of Tennessee*, 11 Humph.

(Tenn.) 523. But see *Taggart* v. *Wood*, 20 Iowa, 236; *Sanchez* v. *Carriaga*, 31 Cal. 170. And the injunction may be maintained against any person who attempts to put such judgment in force, and who has apparent authority for so doing. *Chambers* v. *Bridge Manufactory*, 16 Kan. 270.

The remedy by injunction also lies to prevent proceedings on a satisfied judgment, or where the amount due has been tendered to and refused by the judgment plaintiff. *Bowen* v. *Clark*, 46 Ind. 405. So, a court of equity has jurisdiction to enjoin a sheriff from making a sale of personal property for the payment of taxes, on which he has levied, where the bill alleges that said taxes have been fully paid and discharged. And, upon proof that the taxes have been paid off and discharged, the injunction will be made perpetual. *Lewis* v. *Spencer*, 7 W. Va. 689.

But the mere fact that a creditor fears that when he reduces his claim to judgment, he will not be able to find property on which to levy it, is no ground for an injunction. *Dortic* v. *Dugas*, 52 Ga. 231.

And, as a general rule, if a party asks an injunction to restrain the enforcement of a judgment, or of proceedings under a judgment, he must pay, or offer to pay, what he really owes, and failing to do so, his case cannot be sustained. *Yonge* v. *Shepperd*, 44 Ala. 315; *Baragree* v. *Cronkhite*, 33 Ind. 192. And see *Hill* v. *Harris*, 42 Ga. 412.

The granting unconditionally of a new trial in a cause as effectually vacates a judgment previously rendered therein as if the judgment were set aside in express terms; and an injunction will lie to prevent the collection of such judgment. *Ricketts* v. *Hitchens*, 34 Ind. 348.

In Louisiana, an injunction will lie to restrain the enforcement of a judgment that is null and void because it was rendered in vacation or out of term time, and the injunction will continue pending the appeal from such judgment. *Hernandez* v. *James*, 23 La. Ann. 483.

As a general rule an injunction to restrain the execution of a decree in equity will not be granted; for the reason that, when a court of equity is called upon to enjoin its own proceedings, it is asked to pronounce that to be iniquitous and wrong which it has already declared to be right and proper. *Greenlee* v. *McDowell*, 4 Ired. (N. C.) Eq. 481. Nor will one court of chancery restrain the proceedings of another of the same jurisdiction. *Deaderick* v. *Smith*, 6 Humph. (Tenn.) 138. See *ante*, 730, § 2. But although a court of equity will not enjoin the use of its own process, yet a party aggrieved is not without redress. Upon a proper case made, supported by affidavits, the court will withdraw the process itself, or stay an execution by granting a *supersedeas*. *Greenlee* v. *McDowell*, 4 Ired. (N. C.) Eq. 481.

§ 9. **Staying ecclesiastical decrees.** The court of chancery in England had jurisdiction to restrain proceedings in the ecclesiastical court (*Anonymous*, 1 Atk. 491; *Backhouse* v. *Hunter*, 1 Cox, 342), but would not entertain a bill of discovery in aid of the jurisdiction of the ecclesiastical court, because that court was fully capable of coming at the discovery itself. *Earl of Derby* v. *Duke of Athol*, 1 Ves. 202, 205. But the court of probate, established by statute of 20 and 21 Vict., c. 77, has not the same power of compelling discovery which the old court possessed, and the ancient jurisdiction of the court not being affected by that act, the court of chancery will restrain a man from proceeding in the court of probate to prove a will until he has made the necessary discovery. *Fuller* v. *Ingram*, 28 L. J. Ch. 432; Kerr on Injunction, 152. But the court of chancery has no jurisdiction to interfere against the granting of probate on the ground of the will having been obtained by fraud or forgery, the court of probate being competent to deal with the matter. *Plume* v. *Beale*, 1 P. Wms. 388; *Archer* v. *Mosse*, 2 Vern. 8; *Allen* v. *McPherson*, 1 H. L. Cas. 191.

It is held in New York, that the only ground on which the supreme court can exercise jurisdiction to restrain a bishop from prosecuting a sentence of an ecclesiastical tribunal, by pronouncing judgment of displacement from the ministry of the church, is where such action may affect the civil rights of the party against whom the decree is directed, and for the protection of which rights he has a proper recourse to the civil courts, as for example, the right of exemption from taxation and the performance of certain civil duties. *Walker* v. *Wainwright*, 16 Barb. 486. Where a clergyman is in office, and was originally placed there by the act of the parish, and he claims to be rightfully there, the court will not interfere by injunction to eject him from the church and to prevent him from preaching in it, where there is no other person claiming the office, or with whose rights as a minister of the parish he is interfering. *Youngs* v. *Ransom*, 31 Barb. 49.

§ 10. **Creditors' suit.** A creditor at large, or before judgment, is not entitled to the interference of a court of equity by injunction, to prevent his debtor from disposing of his property in fraud of the creditor. *Shirley* v. *Watts*, 3 Atk. 200; *Wiggins* v. *Armstrong*, 2 Johns. Ch. 144; *Schnitzer* v. *Cohen*, 7 Hun (N. Y.), 665. But when the creditor has established his claim by a judgment at law the relation which he sustains toward the debtor is entirely different and may, under certain circumstances, warrant the interference of a court of equity. Thus, an injunction will issue at the instance of an execution creditor to restrain the debtor in execution, and a prior execution creditor from selling or removing any of the personal property levied on, unless by

sale under the execution, until the second execution is satisfied. *Edgar* v. *Clevenger*, 1 Green's (N. J.) Ch. 258. See *Brinkerhoff* v. *Brown*, 4 Johns. Ch. 671.

§ 11. **Criminal proceedings.** In no case will the courts grant an injunction, or an order in the nature of an injunction, to stay proceedings in any criminal matter. *Lord Montague* v. *Dudman*, 2 Ves. Sr. 396; *Burnett* v. *Craig*, 30 Ala. 135.

ARTICLE VIII.

PATENTS, COPYRIGHTS, TRADE-MARKS, LITERARY PRODUCTIONS.

Section 1. Patents. Courts of equity interfere by injunction in cases of patents for inventions in order to prevent irreparable mischief, suppress multiplicity of suits and vexatious litigation, and to secure the rights of the inventor. 2 Story's Eq. Jur., § 930. The court proceeds on the assumption that the person who makes the application has the legal right which he asserts, but needs the aid of the court for the purpose of protecting his property from damage pending the trial of the legal right. *Bacon* v. *Jones*, 4 Myl. & Cr. 436. In this country, the right to restrain the infringement of a patent by injunction is exercised only by the United States courts, the State courts having no jurisdiction in such cases. See *Rossiter* v. *Hall*, 32 How. (N. Y.) 226; *Parkhurst* v. *Kinsman*, 2 Halst. (N. J.) Ch. 600. And the practice of the former courts in respect to granting injunctions in patent cases, has always been that of the English chancery. *Motte* v. *Bennet*, 2 Fish. Pat. Cas. 642. And see *Nevins* v. *Johnson*, 3 Blatchf. (C. C.) 81.

In acting on applications for temporary injunctions to restrain the infringement of letters patent there is much latitude for discretion. The application may be granted or refused unconditionally, or terms may be imposed on either of the parties as conditions for making or refusing the order. And the state of the litigation, where the plaintiff's title is denied, the nature of the improvement, the character and extent of the infringement complained of, and the comparative inconvenience which will be occasioned to the respective parties by allowing or denying the motion, must all be considered in determining whether it should be allowed or refused; and if at all, whether absolutely, or upon some and what conditions. *Furbush* v. *Bradford*, 1 Fish. Pat. Cas. 317. See, also, *Irvin* v. *Dane*, 4 id. 359; *Orr* v. *Littlefield*, 1 Woodb. & M. 13.

It was formerly the opinion that a court of equity would not in-

terfere by injunction to restrain the infringement of a patent, until the right had been established at law. *Millar* v. *Taylor*, 4 Burr. 2303. But it has since been established that the jurisdiction may be exercised on showing color of title, coupled with an assertion of right which is not denied. *Sheriff* v. *Coates*, 1 Russ. & M. 166; *Universities* v. *Richardson*, 6 Ves. 689. And by the modern usages of the United States courts, injunctions are granted without a previous trial at law, in cases where the owner of a patent shows a clear case of infringement, and has been in the possession and enjoyment of the exclusive right for a term of years without any successful impeachment of its validity. Such possession and enjoyment, aided by the presumptions arising from the patent itself, are usually regarded as sufficient to warrant an injunction to restrain infringement. *Potter* v. *Muller*, 2 Fish. Pat. Cas. 465. See, also, *Weston* v. *White*, 13 Blatchf. (C. C.) 447; *Burleigh Rock Drill Co.* v. *Lobdell*, 1 Holmes, 450; *Gutta-percha Co.* v. *Goodyear Co.*, 3 Sawyer, 542; *Brown* v. *Hinkley*, 6 Fish. Pat. Cas. 370. And the allowance of a jury to settle at law the question of infringement arising on an application for a preliminary injunction, is not a right, but is a matter in the sound discretion of the court, a discretion to be regulated by sound reasons. *Brooks* v. *Norcross*, 2 Fish. Pat. Cas. 661.

If the case is substantially free from doubt as to the title of the complaint, an injunction may be granted regardless of the injury to the defendant. *Morris* v. *Lowell, etc.*, 3 Fish. Pat. Cas. 67. But in cases of doubt as to the complainant's title, or the defendant's infringement, or as to the originality and novelty of the invention, a preliminary injunction will be withheld. *Sullivan* v. *Redfield*, 1 Paine, 441; *Dodge* v. *Card*, 2 Fish. Pat. Cas. 116. See, also, *Sheriff* v. *Coates*, 1 Russ. & M. 159; *Thomas* v. *Weeks*, 2 Paine, 92. And if the granting of an injunction would be more likely to produce than to prevent irreparable mischief it will not be allowed. *Day* v. *Candee*, 3 Fish. Pat. Cas. 9.

One who seeks the equitable aid of the court for the protection of his invention must show diligence in making the application. And if he has openly encouraged or silently acquiesced in the invasion of his right, and has allowed another to expend moneys or erect works upon the faith that no impediment will be placed in the way of his enjoyment, his equity to the extraordinary interference of the court is gone. *Bacon* v. *Jones*, 4 Myl. & Cr. 436; *Bovill* v. *Crate*, L. R., 1 Eq. 388; *Smith* v. *Sharp's Rifle Manuf. Co.*, 3 Blatchf. (C. C.) 545.

Upon an application for a preliminary injunction, where the validity of the patent has been fully established in prior cases, the court will

seldom hear any evidence except on the question of infringement. Under such circumstances, the party, by the established rules of equity, is entitled to the injunction, as a matter of course, without a trial at law. And this is especially true when the defendant is interested in the defense of the prior cases. *Robertson* v. *Hill*, 6 Fish. Pat. Cas. 465. And see *Potter* v. *Holland*, 4 Blatchf. (C. C.) 238; *Woodworth* v. *Edwards*, 3 Woodb. & M. 120.

§ 2. **Copyrights.** The general principles applicable to cases of infringement of patents likewise apply to the violation of copyright. And as in the case of patents, jurisdiction to issue injunctions in cases of copyright in this country is vested exclusively in the United States courts. See *Dudley* v. *Mayhew*, 3 N. Y. (3 Comst.) 9 The person who seeks the aid of the court is not required to make out a clear legal title. All that the court requires is a fair *prima facie* title, either legal or equitable, or a clear color of title with assertion of right. *Chappell* v. *Purday*, 4 Y. & Coll. 485; *Bohn* v. *Bogue*, 40 Jur. 420; *Simms* v. *Marryat*, 7 Eng. Law & Eq. 330; S. C., 17 Q. B. 281.

A book which is itself piratical will not be protected from invasion. *Cary* v. *Faden*, 5 Ves. 24; *Barfield* v. *Nicholson*, 2 Sim. & Stu. 1. Nor will the court protect by injunction any work of a clearly irreligious, immoral, libelous or obscene nature. And if it be a matter of any real doubt whether the work falls within any of these classes, the threatened piracy will not be restrained, but the party will be left to his remedy at law. *Southey* v. *Sherwood*, 2 Meriv. 435; 2 Story's Eq. Jur., § 936; *Martinetti* v. *Maguire*, 1 Abb. (U. S.) 356. And where it appeared doubtful whether the work sought to be protected did not tend to impugn the doctrines of the Scriptures, an injunction against its infringement was refused. *Lawrence* v. *Smith*, 1 Jac. 471.

The complainant must show due diligence in coming into court, and delay or acquiescence will be fatal to the application, unless it can be satisfactorily accounted for. *Mawman* v. *Tegg*, 2 Russ. 393; *Buxton* v. *James*, 5 De G. & S. 84. So, if the conduct of the complainant has led to the state of things that occasions the application, he will be refused relief. *Saunders* v. *Smith*, 3 Myl. & Cr. 711; *Heine* v. *Appleton*, 4 Blatchf. (C. C.) 125. And this doctrine is applicable not only to the cases of his conduct toward the particular person with whom the controversy exists, but also to cases where his conduct with others may influence the court in the exercise of its equitable jurisdiction. *Platt* v. *Button*, 19 Ves. 447; *Campbell* v. *Scott*, 11 Sim. 31.

In cases of copyright it is often a matter of great difficulty to ascertain whether there has been any actual infringement. It is said that

the same rule of decision should be applied to a copyright as to a patent for a machine. The construction of any other machine which acts on the same principle, however its structure may be varied, is an infringement of the patent. The second machine may be recommended by its simplicity and cheapness; still, if it act on the same principle of the one first patented, the patent is violated. So the principle is strongly asserted that in the case of a copyright, if the work alleged to be a piracy is of a character to render the original less valuable by superseding its use in any degree, the right of the author is infringed. *Story's Executors* v. *Holcombe*, 4 McLean, 306. The true test of piracy or not is to ascertain whether the defendant has in fact used the plan, arrangements and illustrations of the plaintiff as the model of his own book, with *colorable* alterations and variations only to disguise the use thereof. *Emerson* v. *Davies*, 3 Story, 795. See, also, *Folsom* v. *Marsh*, 2 id. 115; *Drury* v. *Ewing*, 1 Bond, 540. If the book of the defendant has virtually the same plan and character throughout, and is intended to supersede the other in the market with the same class of readers and purchasers, by introducing no considerable new matter, or little or nothing new except colorable deviations, the relief will be allowed. *Webb* v. *Powers*, 2 Woodb. & M. 514; *Lawrence* v. *Cupples*, 9 Off. Pat. Gaz. 254.

It is clearly established that *bona fide* quotations or extracts from a book, or even a *bona fide* abridgment of it, does not constitute such an infringement as will be restrained by injunction. Thus, extracts may be taken, to a reasonable extent, by a reviewer, for the purpose of showing the merit or demerit of the work. But this privilege cannot be so exercised as to supersede the original book. *Story's Executors* v. *Holcombe*, 4 McLean, 306. See, also, *Scott* v. *Stanford*, L. R., 3 Eq. 718. So, to constitute a *bona fide* abridgment within the privilege there must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon, and not merely the facile use of the scissors, or extracts of the essential parts, constituting the chief value of the original. *Folsom* v. *Marsh*, 2 Story, 100. And see *Gray* v. *Russell*, 1 id. 11.

The same conceptions clothed in another language cannot constitute the same composition, nor can it be called a transcript or *copy* of the same *book*. Hence, it has been held that a prose translation (having no qualities of a paraphrase) of a copyright prose romance, which the author had herself caused to be translated in a way she liked, and copyrighted, is not an infringement of the author's copyright of the original. *Stowe* v. *Thomas*, 2 Wall., Jr., 547. And see *Prince Albert* v. *Strange*, 2 De G. & S. 693. But the translation of a foreign

work may be the subject of copyright in this country. And although any other person has an equal right to translate the original, and to publish his translation, yet he must not make an unfair use of the translation already published. *Emerson* v. *Davies*, 3 Story, 768, 780; *Wyatt* v. *Barnard*, 3 Ves. & B. 77. And where the translator of a foreign play, by consent of the author, has obtained a copyright upon it, the owner of such copyright is entitled to an injunction restraining any other person from using or representing such translation, or any part of it. *Shook* v. *Rankin*, 6 Biss. 477.

It is likewise held that the bringing out and representation upon the stage of a dramatic composition is not such a dedication of it to the public as will authorize others to print and publish it without the author's permission. The manuscript and the right of the author therein are still within the protection of the law the same as if they had never been communicated to the public in any form. *Palmer* v. *De Witt*, 47 N. Y. (2 Sick.) 532; S. C., 7 Am. Rep. 480. And the author may have an injunction, on principles of literary property, against one who publishes his play without his consent, notwithstanding he has represented it in public, and has not copyrighted it. *Boucicault* v. *Hart*, 13 Blatchf. (C. C.) 47. But this relief is to be sought in the State courts in a suit between citizens of the same State. Id. See, also, *Shook* v. *Daly*, 49 How. (N. Y.) 366.

The rights and duties of compilers of books which are not original in their character, but are compilations of facts from common and universal sources of information, of which books, directories, maps, guide books, road books, statistical tables and digests are the most familiar examples, are well settled. No compiler of such a book has a monopoly of the subject of which the book treats. Any other person is permitted to enter that department of literature and make a similar book. But the subsequent investigator must investigate for himself, from the original sources which are open to all. He cannot use the labors of a previous compiler, *animo furandi*, and save his own time by copying the results of the previous compiler's study, although the same results could have been attained by independent labor. The compiler of a digest, a road book, a directory, or a map can search and survey for himself in the fields which all laborers are permitted to occupy, but cannot adopt as his own the products of another's toil. *Banks* v. *McDivitt*, 13 Blatchf. (C. C.) 163. And see *Longman* v. *Winchester*, 16 Ves. 269; *Hotten* v. *Arthur*, 1 Hem. & M. 603; *Scott* v. *Stanford*, L. R., 3 Eq. Cas. 718. It is not, however, to be understood that this rule prohibits an examination of previous works by the compiler before he has finished his own book, in order to ascertain if they contain any heads which he

had forgotten, nor does it prohibit the mere obtaining of ideas from them. But it does prohibit the use of any part of the previous book, *animo furandi*, with an intention to take for the purpose of saving himself labor. *Jerrold* v. *Houlston*, 3 Kay & J. 708. See, also, *Blunt* v. *Patten*, 2 Paine, 397; *Bramwell* v. *Halcomb*, 3 Myl. & Cr. 738; *Pike* v. *Nicholas*, 39 L. J. Ch. 435; *Kelly* v. *Morris*, L. R., 1 Eq. 697.

There may be a copyright in any part of a work, where the parts can be separated. *Low* v. *Ward*, L. R., 6 Eq. Cas. 415. So, there may be a valid copyright in the plan of a book, as connected with arrangement and combination of the material, though all the materials employed, and the subject of the work, may be common to all other writers. *Greene* v. *Bishop*, 1 Cliff. (C. C.) 186. And there may be a copyright in a diagram on a single sheet. *Drury* v. *Ewing*, 1 Bond, 540. But there is said to be no case in which, under the law of copyright, courts have protected the title alone, separate from the book which it is used to designate. If, however, the title itself is original, and the product of the author's own mind, and is appropriated by the infringement, as well as the whole, or a part, of the literary composition itself, in protecting the other portions of the work, the courts would probably also protect the title. *Osgood* v. *Allen*, 1 Holmes, 185; *Jollie* v. *Jaques*, 1 Blatchf. (C. C.) 618.

Judicial decisions are the property of the public, and are not, therefore, the subject of a copyright. *Wheaton* v. *Peters*, 8 Pet. 591, 668; *Little* v. *Gould*, 2 Blatchf. (C. C.) 165; S. C. affirmed, 18 How. (U. S.) 165; *Chase* v. *Sanborn*, 6 Off. Gaz. Pat. 932. But a reporter of judicial decisions may take out a copyright for his reports, which will secure his right to his head-notes, statements of facts and arguments, notations, etc., and his right will be protected by injunction. *Little* v. *Gould*, 2 Blatchf. (C. C.) 165. And see *Butterworth* v. *Robinson*, 5 Ves. 709; *Hodges* v. *Welsh*, 2 Ir. Eq. 266. So, an injunction has been granted against pirating a court calendar, the individual work being regarded as within the protection of copyright, although the general subject, as in the case of a map or chart, was common to all. *Longman* v. *Winchester*, 16 Ves. 269.

§ 3. **Trade-marks.** A trade-mark is a particular mark or symbol, used by a man for the purpose of denoting that the article to which it is affixed is sold or manufactured by him or by his authority, or that he carries on his business at a particular place. Kerr on Injunct. 475; *Leather Cloth Co.* v. *American Cloth Co.*, 11 H. L. Cas. 523, 538; *Seixo* v. *Provezende*, L. R., 1 Ch. App. 192; *Glen and Hall Manuf. Co.* v. *Hall*, 61 N. Y. (16 Sick.) 226; S. C., 19 Am. Rep. 278. Property in

the use of a trade-mark or name has very little analogy to that which exists in copyrights or patents for inventions. Indeed, it is held that there is no such thing as property in a trade-mark as *an abstract name.* It is the right which a person has to use a certain name for articles which he has manufactured, so that he may prevent another person from using it, because the mark or name denotes that articles so marked were manufactured *by a certain person*, and no one else can have the right to put the same name upon his goods, and then represent them to have been manufactured by the person whose mark it is. *Collins Company* v. *Cowen*, 3 Kay & J. 428. And see *Lee* v. *Haley*, L. R., 5 Ch. App. 155, 161. In all cases where rights to the exclusive use of a trade-mark are invaded, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another. And it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. *Canal Company* v. *Clark*, 13 Wall. 311, 322; *Osgood* v. *Allen*, 1 Holmes, 185. Words in common use may be adopted as trade-marks, if, at the time of adoption, they were not used to designate the same or similar articles of production. Id. But a generic name, or a name merely descriptive of an article of trade, or its qualities or ingredients, cannot be adopted as a trade-mark, so as to give a right to the exclusive use of it. *Raggett* v. *Findlater*, L. R., 17 Eq. 29; 7 Eng. R. 653; *Osgood* v. *Allen*, 1 Holmes, 185. And geographical names, which point out only the place of production, and not the producer, cannot be appropriated exclusively, so as to prevent others from using and selling articles produced in the districts they describe under these applications. Id.; *Brooklyn White Lead Co.* v. *Masury*, 25 Barb. 416. See *Congress Spring Co.* v. *High Rock Spring Co.*, 45 N. Y. (6 Hand) 291; S. C., 6 Am. Rep. 82; *Lea* v. *Wolf*, 46 How. (N. Y.) 157; S. C., 15 Abb. (N. S.) 1; *Glenn and Hall Manuf. Co.* v. *Hall*, 61 N. Y. (16 Sick.) 226; S. C., 19 Am. Rep. 278; *Broham* v. *Bustard*, 1 Hem. & M. 447; *McAndrew* v. *Bassett*, 4 De G., J. & S. 380.

The imitation of a trade-mark, which will constitute an infringement thereof, need not be a precise copy of the original. If there is a substantial similarity, so that persons purchasing with ordinary caution are likely to be misled, though they would not be misled if they saw the two trade-marks side by side, it is sufficient to warrant equitable relief. *Seixo* v. *Provizende*, L. R., 1 Ch. App. 192; *Cope* v. *Evans*, L. R., 18 Eq. 138; 9 Eng. Rep. 689; *Hostetter* v. *Vowinkle*, 1 Dill. (C. C.) 329; *Bradley* v. *Norton*, 33 Conn. 157. And where it appears that the party infringing intends to continue the wrong, an injunction against such continuance is the sole adequate remedy. Id.

The essential ingredients for constituting an infringement of a right to a trade-mark are stated to be,—*First*, that the mark has been applied by the plaintiff properly (that is to say), that he has not copied any other person's mark, and that the mark does not involve any false representation; *Secondly*, that the article so marked is actually a vendible article in the market; and *Thirdly*, that the defendant, knowing that to be so, has imitated the mark for the purpose of passing in the market other articles of a similar description. *M'Andrew* v. *Bassett*, 4 DeG., J. & S. 380. See generally in support of these propositions *Hennessy* v. *Wheeler*, 51 How. (N. Y.) 457; *Wolfe* v. *Burke*, 56 N. Y. (11 Sick.) 115; *Candee* v. *Deere*, 54 Ill. 439; S. C., 5 Am. Rep. 125; *Palmer* v. *Harris*, 60 Penn. St. 156; *Flavel* v. *Harrison*, 10 Hare, 467.

An injunction to restrain the infringement of a trade-mark will not be refused on the mere ground that a great number of years has elapsed since it was first infringed by the defendant. But reasonable diligence must be used in making the application for the relief (see *Chappell* v. *Sheard*, 2 Kay & J. 117), and when many years have elapsed before any steps are taken to restrain the infringement, the court will require clearer proof than it would otherwise have done that the trade-mark was adopted by the defendant originally with fraudulent intent, and will require the plaintiff to prove that he has been actually injured by the infringement. *Rodgers* v. *Rodgers*, 31 L. T. (N. S.) 285; S. C., 22 W. R. 887. For a full statement of the general rule of law relating to trade-marks, see *post*, title *Trade-marks*.

§ 4. **Unpublished manuscript.** The author of an unpublished manuscript has an exclusive right of property therein at common law; a right which entitles him to determine for himself whether the manuscript shall be published at all, and in all cases to enjoin its publication by another. This right is absolute and exclusive, and remains in the author and his representatives, even where the material property has, with his consent, been vested in another. The gift of manuscript carries with it no license to publish, except by express agreement. *Thompson* v. *Stanhope*, Ambler, 737; *Duke of Queensbury* v. *Shebbeare*, 2 Eden, 329; *Little* v. *Hall*, 18 How. (U. S.) 170; *Palmer* v. *De Witt*, 40 How. (N. Y.) 293; S. C. affirmed, 47 N. Y. (2 Sick.) 532. And it has been held, that a court of equity will not only interfere to prevent the publication of the work itself, but also the publication of a catalogue containing a description of the work. *Prince Albert* v. *Strange*, 1 Mac. & G. 25.

§ 5. **Publication of letters.** The writer of letters, whether they are literary compositions, or familiar letters, or letters of business, possesses the sole and exclusive right to publish them; and without his

consent, they cannot be published either by the person to whom they are addressed, or by any other. And if the receiver attempts to publish the letters, or any parts of them, against the wishes of the writer, and upon occasions not justifiable, a court of equity is bound to prevent the publication by an injunction, as a breach of that exclusive property which the writer retains. *Pope* v. *Curl*, 2 Atk. 342; *Perceval* v. *Phipps*, 2 Ves. & B. 19; *Woolsey* v. *Judd*, 11 How. (N. Y.) 49; S. C., 4 Duer, 379; *Grigsby* v. *Breckinridge*, 2 Bush (Ky.), 480. See *Wetmore* v. *Scovell*, 3 Edw. Ch. 515. The receiver of private letters may, however, justify their publication in vindication of his own rights or character. *Woolsey* v. *Judd*, 11 How. (N. Y.) 49; S. C., 4 Duer, 379.

§ 6. **Public lectures.** A person who uses his own manuscripts for the purpose of instructing others by public lectures, does not thereby abandon them to the public. Nor does he abandon them, when his pupils are permitted to take copies. *Bartlette* v. *Crittenden*, 4 McLean, 300; 5 id. 32. An injunction may, therefore, be granted, restraining the publication for profit of lectures orally delivered, and taken down in shorthand by the pupils. *Abernethy* v. *Hutchison*, 1 H. & Tw. 28; S. C., 3 L. J. Ch. 209.

§ 7. **Oil paintings, etc.** It has been held that literary property also exists in an oil painting, and that the right to reproduce such painting is property at common law, irrespective of copyright statutes. This right is assignable, and the assignee thereof may restrain by an injunction any party from making and selling any copies of such painting, in the form of photographs or otherwise. *Oertel* v. *Wood*, 40 How. (N. Y.) 10. And see *Parton* v. *Prang*, 7 Am. Law Rev. 357. But see *Oertel* v. *Jacoby*, 44 How. 179.

Wood engravings printed in a book as illustrations of stories therein, and on the same sheet with the letter-press, are part of the book, and are protected by the copyright in the book. A piracy of such engravings, by using them in a book as illustrations of different stories, may be restrained by injunction. *Bogue* v. *Houlston*, 10 Eng. Law & Eq. 215; S. C., 5 DeG. & Smale, 267; *Bradbury* v. *Hotten*, L. R., 8 Exch. 1; 4 Eng. R. 421. So, it is an infringement of a copyright for an engraving, to reproduce copies of it by the photographic process. *Rossiter* v. *Hall*, 5 Blatchf. (C. C.) 362; *Gambart* v. *Ball*, 14 Com. B. (N. S.) 306.

§ 8. **Musical compositions.** Literary property exists also in an uncopyrighted musical composition, and the author may, by injunction, restrain its unauthorized publication by third parties, so long as the exclusive right of property remains in him. But when the author publishes the composition the exclusive right of property therein is gone,

and no injunction will lie to restrain further publication by others. Thus, where an author leaves copies of an uncopyrighted song, in the form of sheet music, with a dealer for sale, but with instructions not to sell before a specified time, a sale of such copies, after the expiration of that time, will be a complete dedication to the public of the author's right in the work from and after that date, and no injunction will lie to restrain further publication by third parties. *Wall* v. *Gordon*, 12 Abb. (N. S.) 349.

A musical composition may be the subject of copyright, and, as such, entitled to protection. But the composition must be substantially a new and original work, and not a copy of a piece already produced, with additions or variations which a writer of music with experience and skill might readily make. *Jollie* v. *Jaques*, 1 Blatchf. (C. C.) 618. If the new air be substantially the same as the old, it is no doubt a piracy; and the adaptation of it, either by changing it to a dance, or by transferring it from one instrument to another, if the ear detects the same air in the new arrangement, will not relieve it from the penalty, and the addition of variations makes no difference. *D'Almaine* v. *Boosey*, 1 Y. & Coll. 288; *Chappell* v. *Davidson*, 2 Kay & J. 123.

But one who adapts works of his own to an old air, adding thereto a prelude and accompaniment also his own, acquires a copyright in the combination, and may, in declaring for an infringement against one who has pirated the whole, properly describe himself as the proprietor of the entire composition. *Lover* v. *Davidson*, 1 C. B. (N. S.) 182.

ARTICLE IX.

PERSONAL RIGHTS OR PECULIAR RELATIONS.

Section 1. Partners. Courts of equity have jurisdiction to restrain by injunction one or more members of a partnership firm from doing acts inconsistent with the terms of the partnership agreement, or with the duties of a partner. And this jurisdiction will be exercised in a proper case, although a dissolution of the partnership is not sought. *Fairthorne* v. *Weston*, 3 Hare, 387; *Miles* v. *Thomas*, 9 Sim. 606; *Richardson* v. *Hastings*, 7 Beav. 301; *Marble Company* v. *Ripley*, 10 Wall. 339. Thus, where one member of a firm had been temporarily insane, and on his recovery was excluded by his copartners from the management of the affairs of the partnership, they were restrained from preventing him from transacting the business of the partnership as a partner. *Anonymous*, 2 Kay & J.

441. So, one member of a firm may be enjoined from removing or displacing servants employed by the other partners, and from removing the books and papers relating to the business of the firm. *Charlton* v. *Poulter*, 19 Ves. 148, note; *Greatrex* v. *Greatrex*, 1 DeG. & S. 692. And in general, the continued and positive misconduct of a partner in relation to partnership affairs, by which permanent injury may result to the partnership, or its future existence be endangered, will be sufficient ground for the issuing of an injunction restraining such acts. *Hood* v. *Aston*, 1 Russ. 412; *Hall* v. *Hall*, 12 Beav. 414; *Goodman* v. *Whitcomb*, 1 Jac. & W. 569.

And after the dissolution of a partnership, any unauthorized interference with the partnership property by any partner not authorized to wind up the partnership affairs may be restrained by injunction. *Smith* v. *Danvers*, 5 Sandf. (N. Y.) 669. And the partner so authorized may be enjoined from misapplying the partnership funds. *Deveau* v. *Fowler*, 2 Paige, 400. And see *Stockdale* v. *Ullery*, 37 Penn. St. 486. It has been likewise held that one member of a firm, after the dissolution of the partnership, may be restrained from publishing letters written to him by another member in the course of their business, and relating thereto, without the consent of the writer; it not appearing that the purposes of justice, civil or criminal, required the publication. *Roberts* v. *McKee*, 29 Ga. 161. The interference of the court in such case is based upon the principle, that a *property* in the letters still remains in the writer. Id.

So, the good will of a business firm is regarded in equity as a part of the assets, and the unauthorized use of the firm name may therefore be enjoined at the suit of the surviving partner, or of the vendee of the good will. See *Banks* v. *Gibson*, 34 Beav. 566; *Bininger* v. *Clark*, 60 Barb. 113; S. C., 10 Abb. (N. S.) 264. But see *Webster* v. *Webster*, 3 Swanst. 490

A partner, who, by the partnership contract, has undertaken to superintend and manage the business, will be enjoined from carrying on the same business, at the same place, in a separate establishment, for his sole benefit, even though there be no express covenant restraining him from so doing. *Marshall* v. *Johnson*, 33 Ga. 500. See, also, *American Bank Note Co.* v. *Edson*, 56 Barb. 84. So, an injunction has been granted to restrain a partner, during the partnership term, from carrying on business with other persons in the name of the old firm, and from publishing notices of dissolution. *England* v. *Curling*, 8 Beav. 129. See, also, *Morris* v. *Colman*, 18 Ves. 437.

The exclusion of one partner by the others from participation in the business of the partnership is a ground for an injunction restraining

the excluding partners from collecting debts due to the firm. *Wolbert* v. *Harris*, 3 Halst. (N. J.) Ch. 605. But where a partner is enjoined in general terms from intermeddling with the property and effects of the firm, it is not a breach of the injunction for him to give a confession of judgment, for a debt *bona fide*, due to a creditor of the firm, for the purpose of enabling such creditor to obtain a preference in payment, by levying upon the partnership effects. *M'Credie* v. *Senior*, 4 Paige, 378.

A person may be enjoined from representing another to be his partner, and holding him out to the world as such, against his wish and without his authority. *Troughton* v. *Hunter*, 18 Beav. 470. But equity will not interfere to restrain a partner from acting as such, merely because if he were known to be acting as partner public confidence in the firm might be shaken. *Anonymous*, 2 Kay & J. 441.

And it is not in every case of misconduct that an injunction will be granted against one partner at the suit of another. Mere disagreements, or quarrels arising from bad temper, and improprieties of conduct, are not a sufficient ground for interference. Unless a partner is conducting himself so grossly as to render it impossible for the business to be carried on in a proper manner, a court of equity will not interfere. *Anderson* v. *Anderson*, 25 Beav. 190; *Warder* v. *Stillwell*, 26 L. J. Ch. 373; *Baxter* v. *West*, 1 Dr. & Sm. 173.

§ 2. **Corporations.** Corporations have, like individuals, full power at common law to dispose of all the property of which they are seised in fee. *Attorney-General* v. *St. John's Hospital*, 2 DeG., J. & S. 621. And unless a breach of trust can be shown, the cases are very rare, in which a court of equity will interfere by injunction to restrain the application of the property of the corporation to other than corporate purposes. *Parr* v. *Attorney-General*, 8 Cl. & Fin. 409; *Attorney-General* v. *Corp. of Carmarthen*, Cooper, 30. If, however, the corporate property be affected by a trust, the jurisdiction of a court of equity to enforce and execute the trust attaches equally as it does upon other property similarly circumstanced. *Attorney-General* v. *St. John's Hospital*, 2 DeG., J. & S. 621; *Dodge* v. *Woolsey*, 18 How. (U. S.) 341; *Wiswell* v. *First Congregational Church*, 14 Ohio St. 31. And it is the right of any member of the corporation to prevent, by injunction, a breach of trust by the majority. Id.

Injunctions are granted with great caution where the effect would be to interfere with the prosecution of important public works which are being carried on by corporations. See *Stewart* v. *Little Miami Railroad Co.*, 14 Ohio, 353. To warrant such interference, it must not only be manifest that the corporation is transcending the authority

given by its charter, but also that the interposition of equity is necessary to prevent injury that cannot be adequately compensated in damages. *James River, etc., Co.* v. *Anderson*, 12 Leigh (Va.), 278; *Gartside* v. *City of East St. Louis*, 43 Ill. 47. Nor should the operations of a corporation in the construction of a great work of public convenience be suddenly arrested without notice, unless in a case of urgent and pressing necessity. *Ross* v. *Elizabethtown, etc., R. R. Co.*, 1 Green's (N. J.) Ch. 422. And where acts requiring judgment, science and professional skill are confided to the discretion of the officers of a corporation, the exercise of that discretion will not be lightly disturbed by injunction. *Walker* v. *Mad River, etc., R. R. Co.*, 8 Ohio, 38. But in case of an act of oppression by the officers and agents of a corporation, under color of their office, a less grievance in the nature of a trespass constitutes a ground for the interference of equity, than when the trespass is by a private person. *Ryan* v. *Brown*, 18 Mich. 196, 212.

It is now a well-established rule, that if the managers of a corporation are about to engage in an enterprise not contemplated by the charter, or to apply its funds or credit to other purposes than those specified in the charter, a court of equity will interfere by injunction for the protection of the rights of shareholders. *March* v. *Eastern Railway*, 40 N. H. 548; *Perry* v. *Kinnear*, 42 Ill. 160; *Winebrenner* v. *Colder*, 43 Penn. St. 244; *Beman* v. *Rufford*, 6 Eng. Law & Eq. 106; *Nazro* v. *Merchants' Mut. Ins. Co.*, 14 Wis. 295; *Central R. R. Co.* v. *Collins*, 40 Ga. 582. And the relief may be granted in such cases at the suit of a single stockholder. *Kean* v. *Johnson*, 1 Stockt. (N. J.) 401; *Simpson* v. *Westminster Palace Hotel Co.*, 8 H. L. Cas. 712. Due diligence must however be shown in the assertion of his rights, and if he delays until large sums of money have been expended and great public interests created, the relief will be denied. *Goodin* v. *Cincinnati, etc., Canal Co.*, 18 Ohio St. 169; *Attorney-General* v. *Delaware, etc., R. R. Co.*, 27 N. J. Eq. 1. See, also, *Kent* v. *Jackson*, 14 Beav. 367; *Gregory* v. *Patchett*, 33 id. 595.

The principles which guide a court of equity in restraining a company from doing illegal acts are the same as those on which it interferes in other cases. If the right at law is clear, and the breach is clear, and serious injury is likely to arise from the breach, the court will interfere at once and protect the right by injunction. But, if the right at law is not clear, or the breach is doubtful, the court, in determining whether or not it shall interfere by injunction, is guided by the balance of convenience and inconvenience likely to arise to the parties from granting or withholding the injunction. *Fielden* v. *Lan-*

cashire, etc., Railway Co., 2 DeG. & S. 531; *Bullock* v. *Chapman*, 2 DeG. & S. 673; Kerr on Injunct. 541.

A social corporation, which has entered into a continuing contract with a life insurance company for the insurance of lives of members thereof on special terms advantageous to all the members, such corporation agreeing not to insure its members in any other company, may be restrained from violating such contract by transferring its insurance to another company, without showing a justification or legal excuse for so doing. *World Mut. Life Ins. Co.* v. *Bund "Hand in Hand,"* 47 How. (N. Y.) 32.

§ 3. **Public officers.** The preventive jurisdiction of equity likewise extends to the acts of public officers. But this jurisdiction will be exercised only to prevent a breach of trust affecting public franchises, or some illegal act under color or claim of right affecting injuriously the property rights of individuals. *Greene* v. *Mumford*, 5 R. I. 472; *Mott* v. *Pennsylvania R. R. Co.*, 30 Penn. St. 9; *New London* v. *Brainard*, 22 Conn. 553; *Green* v. *Green*, 34 Ill. 320. See *Brown* v. *Trustees of Catlettsburg*, 11 Bush (Ky.), 435. To entitle a plaintiff to the interposition of the court, he must not only show a clear legal and equitable right to the relief demanded, or to some part of it, and to which the injunction is essential, but also that some act is being done by the defendant, or is threatened and imminent, which will be destructive of such right, or cause material injury to him. *People* v. *Canal Board*, 55 N. Y. (10 Sick.) 390. See, also, *Bigelow* v. *Hartford Bridge Co.*, 14 Conn. 565.

An injunction will not be granted to control the action of public officers constituting an inferior *quasi* judicial tribunal, such for instance, as a board of supervisors, on matters pertaining to their jurisdiction. *Mooers* v. *Smedley*, 6 Johns. Ch. 28. See, also, *Warfel* v. *Cochran*, 34 Penn. St. 381; *Frewin* v. *Lewis*, 4 Myl. & Cr. 249. Nor has a court of equity power to enjoin the exercise of the police powers given by law to the officers of a municipal corporation, so as to prevent such officers from preserving the public peace, and from keeping a public street open to public use. The court has no jurisdiction to interfere with the public duties of any of the departments of the government, or to override the policy of the State. *City of Chicago* v. *Wright*, 69 Ill. 318. And where an election is called in pursuance of a law authorizing it, a court of equity has no power to restrain the officers from holding, or the people from voting at such election. Nor can they be punished for disobeying an injunction issued in such a case, as the court has no jurisdiction to issue the writ. *Walton* v. *Develing*, 61 id. 201.

Nor will a court of equity interfere by injunction, at the instance of

a person who claims an office under an election by the people, to restrain the payment of the salary to the incumbent, pending the trial of a contest as to the right to the office, unless it be shown that an action at law for the salary or fees received by the incumbent would be abortive. *Colton* v. *Price*, 50 Ala. 424.

Nor should injunctive process be issued to restrain a party from taking possession of the books and papers of an office, under a color of title thereto. On the contrary, the opposite theory prevails, that title to an office can only be tried in a proceeding in the nature of a *quo warranto*. *Coulter* v. *Murray*, 15 Abb. (N. S.) 129; S. C., 4 Daly, 506; *Updegraff* v. *Crans*, 47 Penn. St. 103. See *Palmer* v. *Foley*, 45 How. (N. Y.) 110; S. C., 4 Jones & Sp. 14.

Where treasurers have in their possession moneys belonging to a county, which, unless restrained, they will pay to the holders of bonds of such county issued without warrant of law, and void in the hands of the holders, equity will interfere at the suit of the county to restrain such payment. *Missouri, etc., R. R. Co.* v. *Commissioners*, 12 Kan. 230. And see *Rice* v. *Smith*, 9 Iowa, 570; *Self* v. *Jenkins*, 71 N. C. 578.

The president of the United States cannot be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional. And it makes no difference whether such incumbent of the presidential office be described in the bill as president or simply as a citizen of a State. *State of Mississippi* v. *Johnson*, 4 Wall. (U. S.) 475. See *post*, title *Municipal Corporations*.

§ 4. **Executors, assignees, etc.** It is a well-established principle of equity, that an executor or other trustee, who mismanages or puts the assets in jeopardy by his insolvency, either existing or impending, should be prevented from further interfering with the estate, and that the fund should be withdrawn from his hands. *Middleton* v. *Dodswell*, 13 Ves. 266; *Mansfield* v. *Shaw*, 3 Madd. 100, n; *Elmendorf* v. *Lansing*, 4 Johns. Ch. 562. The mere circumstance that an executor is poor and in mean circumstances, is not a sufficient ground for the interference of equity (*Howard* v. *Papera*, 1 Madd. 142. See, also, *Schanck* v. *Schanck*, 3 Halst. [N. J.] Ch. 140); but an injunction will be allowed where an executor or administrator is proved to be of bad character, drunken habits, and very poor. *Everett* v. *Prythergch*, 12 Sim. 365. And where an administrator is proceeding to sell the effects of his intestate without due authority, he may properly be restrained by injunction. *Lawrence* v. *Philpot*, 27 Ga. 585; *Chappell* v. *Akin*, 39 id. 177. So, where the executors refuse to distribute the estate ratably among the creditors of the decedent, according to the terms of

the devise, and threatened to secure certain favorite creditors, who were entitled to no preference at law or in equity, an injunction was granted restraining the executors from making such a disposition of the estate. *Depau* v. *Moses*, 3 Johns. Ch. 349. And where a non-resident and insolvent executor is seeking, by a suit at law, to get possession of a fund belonging to the estate, which, it is apprehended, will be wasted or misapplied, he may be enjoined from further prosecuting his suit at law. *Dougherty* v. *Walker*, 15 Ga. 442. And see *Pierce* v. *Jones*, 23 Ga. 374.

An injunction may likewise issue to restrain executors from making a distribution of the assets of a testator, pending the final determination of a suit brought by the executors against the surviving partners of the testator, to close up the estate, where, in such cases, the defendants interpose a counter-claim for moneys withdrawn from the firm by the deceased during his life-time, and without the consent of his co-partners. *Mitchell* v. *Stewart*, 3 Abb. N. S. (N. Y.) 250. See *ante*, title *Executors*.

§ 5. **Married women.** For many purposes, courts of equity treat the husband and wife as distinct persons, capable of contracting with each other, of suing each other, and of having separate estates, debts and interests. See 2 Story's Eq. Jur., § 1368; *Cayce* v. *Powell*, 20 Tex. 767. If the separate estate of the wife be levied on for the debt of her husband, an injunction will be granted to stay the sale, in default of any other remedy. *Calhoun* v. *Cozens*, 3 Ala. 498. Thus, an injunction was issued in favor of a married woman to protect ancient family pictures, furniture and other articles of a peculiar nature and value, taken on execution by creditors of the husband. *Lady Arundell* v. *Phipps*, 10 Ves. 139. So, a creditor of the husband was enjoined from selling on execution, growing crops, produced on the separate property of the wife by her labor and that of the minor children of the husband. *Johnson* v. *Vail*, 1 McCart. (N. J.) 423. So, a husband will be enjoined from interference with property settled on the wife. *Green* v. *Green*, 5 Hare, 400, n. And where personal chattels were bequeathed to a single woman for life for her separate use, without the intervention of a trustee, upon their being seized in execution by a judgment creditor of an after-acquired husband, who was, in fact, at law entitled to such chattels, but in equity only as a trustee for his wife, an injunction was granted to restrain a sale. *Newlands* v. *Paynter*, 4 Myl. & Cr. 408. And see *Smith* v. *Bank of Wadesborough*, 4 Jones' (N. C.) Eq. 303.

Where a statute expressly exempts the wife's real estate from sale under execution by creditors of the husband, an injunction will issue

to restrain such sale, and it is error to dismiss a bill filed by the wife for that purpose. *Hunter's Appeal*, 40 Penn. St. 194.

Upon a proper case being made out, an injunction will be granted to restrain a husband from preventing his wife from seeing a person whom she wishes to consult. *Middleton* v. *Middleton*, 1 Jac. & W. 94. So, pending proceedings for a divorce from the bonds of matrimony, a court of equity will, in a proper case, enjoin the husband from interfering with the children, or the property in the possession of the wife. *Halloway* v. *Davis*, Wright (Ohio), 129. He may likewise be enjoined from selling or disposing of his property, or removing the same out of the jurisdiction of the court pending such proceedings. *Questel* v. *Questel*, id. 492; *Vermilyea* v. *Vermilyea*, 14 How. (N. Y.) 470; *Ricketts* v. *Ricketts*, 4 Gill (Md.), 105. See, also, *Vanzant* v. *Vanzant*, 23 Ill. 536. And in cases of divorce or separation, courts of equity have the power of restoring to the wife the whole or a portion of her property, and of restraining the husband from receiving gifts or legacies to her after such divorce or separation. *Holmes* v. *Holmes*, 4 Barb. 295. An injunction will not, however, be granted to restrain the husband from alienating his property, upon the mere *apprehension* of an abandonment. *Anshutz* v. *Anshutz*, 16 N. J. Eq. 162. Nor, pending proceedings for a divorce, is the wife entitled to an injunction to restrain the husband from using his property for the necessary support of himself and his children, or from using his tools of trade, or from carrying on his ordinary business. *Rose* v. *Rose*, 11 Paige, 166. And where a decree of divorce is made in favor of the wife, it is improper to direct that the husband be perpetually enjoined from selling his property, in order to insure the payment of alimony decreed to the complainant. *Errissman* v. *Errissman*, 25 Ill. 136.

§ 6. **Attorneys and counsel.** See *ante*, Vol. 1, title *Attorneys*. It is for the interests of justice that the most full, free and complete communication should take place between the attorney and his client. The disclosure of confidential communications made to an attorney in the course of his professional employment will, therefore, be restrained by injunction. *Greenough* v. *Gaskell*, 1 Myl. & K. 98; *Ford* v. *Tennant*, 32 Beav. 164. Even after the determination of a suit, the attorney may not disclose any confidential communications made during its progress, nor does the privilege terminate with the death of the client. *Russell* v. *Jackson*, 9 Hare, 391. See *Parratt* v. *Parratt*, 2 De G. & S. 262. The privilege does not, however, extend to communications between the attorney and third parties (*Ford* v. *Tennant*, 32 Beav. 164); nor does it extend to cases where a fraudulent transaction has come to the

knowledge of the attorney in the course of his employment, since an employer can have no property in iniquitous secrets. *Gartside* v. *Outram*, 3 Jur. (N. S.) 40. See, also, *Coveney* v. *Tannahill*, 1 Hill (N. Y.), 33. And the existence of an illegal purpose will prevent any privilege from attaching to the communications between the attorney and client. *Follett* v. *Jeffreyes*, 1 Sim. (N. S.) 3.

A distinction is likewise made between cases where an attorney voluntarily makes a communication which is privileged, and cases where he is required to disclose what he knows by giving evidence in a court of justice. In the former he will be restrained by injunction (*Lewis* v. *Smith*, 1 Mac. & G. 417), while in the latter, a court of equity will not interfere. *Beer* v. *Ward*, 1 Jac. 77.

Ignorance or mistake on the part of counsel employed in a cause will not authorize an injunction against the judgment. *Shricker* v. *Field*, 9 Iowa, 366. And mere negligence in an attorney, unaccompanied by fraudulent combination or connivance, is not deemed a sufficient ground for equitable interposition to restrain a judgment. *Wynn* v. *Wilson*, Hemp. (C. C.) 698. Nor will the fact that the attorney abandoned the cause warrant an injunction against the judgment, where other counsel were employed and a trial had, no fraud being alleged. *Winchester* v. *Grosvenor*, 48 Ill. 517.

The doctrine that a disclosure of secrets communicated to another in the course of a confidential employment, will be restrained by injunction, extends to secrets of trade or secrets of title, or any other secrets of the party important to his interests. 2 Story's Eq. Jur., § 952; *Cholmondeley* v. *Clinton*, 19 Ves. 261; *Evitt* v. *Price*, 1 Sim. 483. And it is held, that one who invents or discovers, and keeps secret, a process of manufacture, whether proper for a patent or not, has a property therein which a court of equity will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or disclose it to third persons. *Peabody* v. *Norfolk*, 98 Mass. 452. See, also, *Morison* v. *Moat*, 6 Eng. Law & Eq. 14.

§ 7. **Tenants in common.** An injunction may be granted to stay waste between tenants in common in certain special cases,—as where the defendant is insolvent, or the defendant in possession is committing acts of waste, destructive to the estate, and not needed for the necessary use of the farm. *Hawley* v. *Clowes*, 2 Johns. Ch. 122. And see *ante*, 694, title 2, art. 1, § 7. So, after there has been a judgment at law, at the instance of some tenants in common, for an actual partition of land, the other tenants or any of them may have an injunction against the judgment, upon the allegation that the land cannot be actually divided without injury to the owners. And under such circumstances the

injunction will be continued until the hearing, that the court may decide, upon the proofs, whether an actual partition or a sale of the premises would be more for the interest of the parties. *Gash* v. *Ledbetter*, 6 Ired. (N. C.) Eq. 183.

ARTICLE X.

PERFORMANCE OF CONTRACTS.

Section 1. Personal services. The question whether or not a court of equity will interfere, by injunction, to prevent a breach of a contract for personal services, or whether the complainant must look to his damages at law as his sole redress, has been frequently, and in several cases quite elaborately, discussed, both in England and in this country.

As the result of these discussions it may be stated as a general rule, that a court of equity will not interfere to restrain, by injunction, a violation of a restrictive covenant in a contract in relation to ordinary business transactions, but the aggrieved party will be left to his remedy at law. Thus, in the case of an agreement between an artisan and his employer, that the former shall work for the latter and for no other person, the court will not enforce the covenant to render the services. Full redress for any injury that may arise from a breach of such covenant may be recovered in an action at law, in the form of damages. *Haight* v. *Badgeley*, 15 Barb. 499. And see *Clarke* v. *Price*, Wils. Ch. Cas. 157; *Hooper* v. *Brodrick*, 11 Sim. 47; *Johnson* v. *Shrewsbury, etc., Railway Co.*, 3 DeG. M. & G. 914; *Burton* v. *Marshall*, 4 Gill (Md.), 487; *Caldwell* v. *Cline*, 8 Mart. (N. S.) 684. There are cases, however, in which the nature of the services to be rendered are such as to preclude the possibility of giving to the injured party adequate compensation in damages,—as where the services involve the exercise of powers of the mind, as of writers and performers. And the distinction made is, that when the services to be rendered are purely intellectual, and are peculiar and individual in their character, the court will interfere by injunction in aid of a special performance; but where the services are material and mechanical, the remedy is in an action for damages. *Hayes* v. *Willio*, 11 Abb. (N. S.) 167; *Morris* v. *Coleman*, 18 Ves. 437. And there is said to be no reason why contracts for theatrical performances should stand upon a footing different from other contracts involving the exercise of intellectual faculties. It is therefore held, that actors and actresses, like all other persons, should be held to a true and faithful performance of their engagements; and whenever the court has not proper jurisdiction to enforce the whole engagement, it

should, as in all other cases, operate to bind their consciences, at least so far as they can be bound, to a true and faithful performance. *Daly* v. *Smith*, 6 Jones & Sp. (N. Y.) 170; S. C., 49 How. 159; *Lumley* v. *Wagner*, 1 DeG. M. & G. 604; *Montague* v. *Flockton*, L. R., 16 Eq. Cas. 189; 6 Eng. Rep. 704.

§ 2. **Usury.** Where it is sought to enjoin proceedings at law upon usurious contracts, the courts exact a strict observance of the principle that one who comes into a court of equity must come prepared to do equity. *Ante*, 201. The injunction will, therefore, be granted only on condition that the party aggrieved make actual payment or tender of the amount that is really and *bona fide* due. *Rogers* v. *Rathbun*, 1 Johns. Ch. 367; *Sporrer* v. *Eifler*, 1 Heisk. (Tenn.) 633; *Ballinger* v. *Edwards*, 4 Ired. (N. C.) Eq. 449; *Turpin* v. *Povall*, 8 Leigh (Va.), 93; *Smith* v. *Heath*, 4 Daly (N. Y.), 123. See, also, *Bissell* v. *Kellogg*, 60 Barb. 617; S. C. affirmed, 65 N. Y. (20 Sick.) 432.

§ 3. **Sailing of vessels.** In cases of dispute between joint owners of a vessel the court applies the rule of admiralty, and gives the majority in interest the possession and control, where there is such majority, and where there is not, orders the vessel sold and at the same time restrains both parties from using her. *Furniss* v. *Brown*, 8 How. (N. Y.) 59; *Dunham* v. *Jarvis*, 8 Barb. 88.

ARTICLE XI.

FRAUD.

Section 1. In general. See *ante*, 429, title *Fraud*. Fraud is one of the broadest grounds of equity recognized by the courts. And it is a general rule that a court of equity will relieve against judgments obtained by fraud, if there has been no fault or negligence on the part of the defendant in making his defense; but it is otherwise if there has been such fault or negligence. *Hinrichsen* v. *Van Winkle*, 27 Ill. 334; *Tomkins* v. *Tomkins*, 11 N. J. Eq. 512. And see *ante*, 733, art. 7, § 8. And it would require a very strong case of fraud to induce equitable interference with the completion of a sale upon an execution at law. *Skillman* v. *Holcomb*, 12 N. J. Eq. 131.

Nor will an injunction be granted for fraud, unless the bill sets forth the specific acts of fraud upon which the injunction is sought. A general allegation of fraud is insufficient, even in a case where the injury might be irreparable. *Powell* v. *Parker*, 38 Ga. 644; *Hubbard* v. *Hubbard*, 14 Md. 356.

ARTICLE XII.

ACCIDENT AND MISTAKE.

Section 1. In general. It is a well-established rule, that a court of equity will interfere in all cases to prevent the conversion of a court of law into an instrument of injustice in the perpetuation and enforcement of wrongs arising from accident or mistake, as well as those arising from fraud. See *Wingate* v. *Haywood*, 40 N. H. 437; *Wood* v. *Seely*, 32 N. Y. (5 Tiff.) 105, 113; *Briggs* v. *Shaw*, 15 Vt. 78. Thus, the written agreement between the maker and the payee of a note, in relation to the contract in pursuance of which the note was made, having been lost at the time the judgment was recovered on the note, and without which agreement the maker was unable to establish his defense at law,—this was held sufficient ground to warrant an injunction against the judgment. *Vathir* v. *Zane*, 6 Gratt. (Va.) 246. And the loss of a written instrument which would have operated as a defeasance of a bond was held to be sufficient ground for equitable in, terposition by an injunction against the judgment, though no defense was made at law. *Wilson* v. *Davis*, 1 A. K. Marsh. (Ky.) 219. But equity will, in no case, grant a man relief on the ground of accident where the accident has arisen from his own gross negligence or fault. *Marine Ins. Co.* v. *Hodgson*, 7 Cranch (U. S.), 336; *Taylor* v. *Fore*, 42 Tex. 256. And see *ante*, Vol. 1, title *Accidents*.

A court of equity will grant relief by injunction against a judgment obtained through a mistake of fact. *Meem* v. *Rucker*, 10 Gratt. (Va.) 506; *Shricker* v. *Field*, 9 Iowa, 366. But will not interfere where the mistake is one of law. *Richmond, etc., R. R. Co.* v. *Shippen*, 2 Pat. & H. (Va.) 327; *Hubbard* v. *Martin*, 8 Yerg. (Tenn.) 498; *Risher* v. *Roush*, 2 Mo. 77. So, ignorance of material facts necessary to a defense at law may constitute sufficient ground for the interposition of equity, but ignorance of law is not deemed a sufficient reason for the exercise of the jurisdiction. *Iglehart* v. *Lee*, 4 Md. Ch. 514; *Hubbard* v. *Hobson*, Breese (Ill.), 190; *Meem* v. *Rucker*, 10 Gratt. (Va.) 506. See *ante*, 163, 164, 165, 166, *Equity*.

ARTICLE XIII.

MISCELLANEOUS CASES.

Section 1. In general. The issue of negotiable bonds by a public corporation will be enjoined, when the statute authorizing their issue

only upon certain terms has not been complied with in matters of substance. *Union Pacific R. R. Co.* v. *Lincoln Co.*, 3 Dill. 300. And although the legislative branch of a municipal corporation may not be restrained from legislating in any manner, whether improperly or otherwise, yet an injunction order may issue to prevent the result of illegal legislation, and the carrying out of measures manifestly in violation of law. *People* v. *Mayor, etc., of New York*, 32 Barb. 35; S. C., 19 How. 155; 10 Abb. 144. And see *People* v. *Tweed*, 13 Abb. (N. S.) 25, 82. So, when stock in a corporation is transferred, without consideration, for the purpose of fraudulently controlling an election, an injunction is the proper remedy to prevent the transferees from voting. *Webb* v. *Ridgely*, 38 Md. 364. And the illegal or wrongful act of an individual, resulting in a public injury, may be restrained by injunction. *Davis* v. *Lambertson*, 56 Barb. 408. And see *ante*, 703, title 2, art. 1, § 9.

An injunction is held to be a proper remedy where persons claiming to be trustees of a religious society interfere with the property in the hands of the proper trustees of the society. *Trustees* v. *Hæssli*, 13 Wis. 348. See *Miller* v. *English*, 6 N. J. Eq. 304. And the trustees of a church are entitled to an injunction restraining a clergyman from retaining possession of a church, and forcing the congregation to accept his ministrations against their will. *Trustees* v. *Stewart*, 43 Ill. 81. But the trustees of a church will not be restrained at the suit of a pew-holder, from pulling down the old church, where it has become dilapidated, for the purpose of erecting a new one, the pew-holders in such case being left to their remedies at law. *Heeney* v. *St. Peter's Church*, 2 Edw. Ch. 608. See, also, *Abernethy* v. *Church of the Puritans*, 3 Daly (N. Y.), 1.

The use of a public school-building for any private purpose, such as the holding of religious or political meetings, social gatherings and the like, is unauthorized by law, and may be restrained at the instance of any party injured thereby, even though a majority of the electors and tax payers of the school district assent to such use and an adequate rent is paid therefor, and although the injury to the party complaining may be very slight. *Scofield* v. *Eighth School District*, 27 Conn. 498; *Spencer* v. *School District*, 15 Kan. 259. And see *Hurd* v. *Walters*, 48 Ind. 148; *School Dist. No.* 8 v. *Arnold*, 21 Wis. 657. So, where two congregations built a church for their joint use in "divine service," and against the protest of one and their articles of association, the other introduced a Sabbath school into the church, —it was held, that equity had jurisdiction to restrain the latter congregation. *Gass' Appeal*, 73 Penn. St. 39; S. C., 13 Am. Rep. 726.

The farther prosecution of an action of forcible entry and detainer may be enjoined, but the power should be exercised only where otherwise certain and manifest irreparable injury would be done. *Crawford* v. *Paine*, 19 Iowa, 172.

That courts of equity will entertain jurisdiction to enjoin such illegal acts as will necessarily result in a cloud upon title, see *Christie* v. *Hale*, 46 Ill. 117; *Pixley* v. *Huggins*, 15 Cal. 127; *Chipman* v. *City of Hartford*, 21 Conn. 489; *Martin* v. *Hewitt*, 44 Ala. 418; *Leslie* v. *St. Louis*, 47 Mo. 474; *Tucker* v. *Kenniston*, 47 N. H. 267; *Pettit* v. *Shepherd*, 5 Paige, 493. But see *Montgomery* v. *McEwen*, 9 Minn. 103; *Armstrong* v. *Sanford*, 7 id. 49.

ARTICLE XIV.

BY WHOM OBTAINABLE.

Section 1. In general. In treating of the various cases in which courts of equity entertain jurisdiction to grant injunctions the parties by whom and against whom the relief is obtainable have in most instances been pointed out. In this connection it may be stated as a general rule, that where the acts sought to be restrained constitute a public wrong, the proper party to seek relief is the State, or some officer authorized to act in behalf of the State. An injunction cannot be obtained by a private individual in such cases, unless he can show that the act complained of involves some peculiar damage to his individual interests. *Doolittle* v. *Supervisors of County of Broome*, 16 How. 512; S. C., 18 N. Y. (4 Smith) 155; *Williams* v. *Smith*, 22 Wis. 594; *Frink* v. *Lawrence*, 20 Conn. 117. And see *People* v. *Albany & Susquehanna R. R. Co.*, 57 N. Y (12 Sick.) 161.

Where different parties were severally the owners of separate adjoining tracts of land, on which separate assessments for the construction of a road had been made, and had no joint interest in the lands, but were alike affected by the assessment, it was held that they might all unite in a complaint for an injunction. *Robbins* v. *Sand Creek Turnpike Co.*, 34 Ind. 461. And see *Powell* v. *Spaulding*, 3 Iowa, 443. But one municipality cannot obtain an injunction to restrain the collection of tax levied by another municipality. That remedy can be invoked only by the tax payer. *Nunda* v. *Chrystal Lake*, 79 Ill. 311.

ARTICLE XV.

AGAINST WHOM.

Section 1. In general. As a general rule an injunction order can only go against a party to the action or proceedings in which it is issued. *Watson* v. *Fuller*, 9 How. (N. Y.) 425. And see *Rorke* v. *Russell*, 2 Lans. (N. Y.) 244.

As to the non-joinder of parties in an application for an injunction, the true rule is stated to be that where the injunction will have the effect of injuring in any material respect the rights of absent persons, the court will not, unless in case of special necessity, interfere with such rights. But where the absence of persons as parties constitutes, so far as the granting or refusing of the injunction is concerned, a formal rather than a substantial defect, there is no ground arising from such fact for a refusal of the temporary aid of the court, if such aid appears, under the circumstances, to be equitable. *Morgan* v. *Rose*, 22 N. J. Eq. 583. Thus, where it was sought to enjoin the trustees of a church from performing certain acts, it was held that the joinder of the church in its corporate capacity was not essential. Id. See *Schwoerer* v. *Boylston Market Association*, 99 Mass. 285.

TITLE III.

IN WHAT CASES NOT ALLOWED.

ARTICLE I.

REAL PROPERTY.

Section 1. Sale of land. As a general rule, an injunction will not be granted restraining any alienation or disposition of real property during the pendency of an action in relation thereto where the rights of the plaintiff are fully protected by the filing of a notice of *lis pendens*. And this rule will be strictly observed where the plaintiff's rights to ultimate relief are doubtful, or the defendant is fully responsible for any loss or damage which the plaintiff may sustain by his acts. *Mills* v. *Mills*, 21 How. (N. Y.) 437; *Spiller* v. *Spiller*, 3 Swanst. 557; *Gregory* v. *Gregory*, 1 Jones & Sp. (N. Y.) 1.

A conveyance of land obtained upon a verbal promise that the purchaser would secure the purchase-money by a mortgage, which he

afterward refused to do, was held not to constitute a sufficient ground for enjoining the purchaser from selling the land, no deception having been practiced in obtaining the conveyance. *Ellsworth* v. *Starbird*, 32 Me. 176. And where, under a contract for the purchase of lands, the vendee took possession and erected a dwelling-house, and the vendor subsequently declared the contract forfeited for non-payment of an installment of the purchase-money, and, pending proceedings to recover possession, asked an injunction to restrain the vendee from removing the house, the injunction was refused, on the ground that to grant the relief would be to aid in enforcing the forfeiture. *Crane* v. *Dwyer*, 9 Mich. 350. See *ante*, 159, *Equity*.

§ 2. **Mortgage of land.** See *ante*, 690, title 2, art. 1, § 2; *Bloomingdale* v. *Barnard*, 7 Hun (N. Y.), 459.

§ 3. **Lease of land.** The general rule that covenants in regard to the lease of lands will be enforced by injunction cannot be extended to covenants to carry on a particular business on the demised premises. But any act tending to render the carrying on of such business impossible may be restrained. *Hooper* v. *Brodrick*, 11 Sim. 47. See *Macher* v. *Foundling Hospital*, 1 Ves. & B. 188; *Steward* v. *Winters*, 4 Sandf. Ch. 587.

§ 4. **Liquidated damages.** An injunction to restrain the breach of a covenant will, in general, be denied where the parties have by agreement fixed upon a specific sum as liquidated damages for such breach. *Barnes* v. *McAllister*, 18 How. (N. Y.) 534. See *ante*, 693.

§ 5. **Affirmative and negative covenants.** Where a contract contains both affirmative and negative covenants, and the affirmative covenant cannot be enforced by the court, but is the consideration for which the negative covenant was given, or where it is impossible to determine, without a trial at law, whether damage has resulted from a breach of the latter covenant, no injunction will be granted, although the court possesses undisputed power to grant the order. *Hills* v. *Croll*, 2 Phill. Ch. 60; *Lumley* v. *Wagner*, 1 De G., M. & G. 604. And see *Peto* v. *Brighton, etc., Railway Co.*, 1 H. & M. 468; S. C., 11 W. R. 874; *ante*, 754, title 2, art. 10, § 1.

An injunction is granted to prevent the breach of a covenant not to perform an act of a personal character, or relating to personal property, only on the ground that the performance of the act would produce irreparable damages, and, therefore, when no damages can result, there can be no injunction. Thus, if the object of a restrictive clause in a contract for personal services by the defendant as a danseuse is to prevent the defendant from dancing for others, *without any substantial benefit to arise therefrom to the plaintiffs*, an injunction should not issue

to restrain a breach of it. *De Pol* v. *Sohlke*, 7 Robt. (N. Y.) 280. But see *ante*, 754, art. 10, § 1.

§ 6. **Trespass.** An injunction order in a case of trespass will be denied unless the following conditions have been clearly established: *First*, admission or adjudication of the plaintiff's right; *Second*, admission or adjudication of the defendant's wrong; and *Third*, inadequacy of a remedy at law. *Thomas* v. *Oakley*, 18 Ves. 184; *Gentil* v. *Arnand*, 38 How. (N. Y.) 94; S. C., 1 Sweeny, 641. If the trespass amount to an actual ouster, it is remediable by ejectment; if it fall short of ouster, then by trespass, and in neither case will an injunction lie, in the absence of any special equity in the case. Id. And see *ante*, 700, title 2, art. 1, § 8; *Felton* v. *Justice*, 51 Cal. 529. A threat and intent to commit a naked trespass constitute no ground for an injunction to restrain such purposed trespass. *Woods* v. *Kirtland*, 2 La. Ann. 337; *Tevis* v. *Ellis*, 25 Cal. 515.

§ 7. **Easements.** To authorize the interference of a court of equity by injunction in cases of easements, there should be not only a clear and palpable violation of the plaintiff's rights, but the rights themselves should be certain, and such as are capable of being clearly ascertained and measured. *Olmsted* v. *Loomis*, 6 Barb. 152. And see *Agate* v. *Lowenbein*, 4 Daly, 62. And if only a possible injury to the complainant's easement is shown, an injunction will not be allowed. Thus, it is held that an injunction will not be granted at the suit of the owner of a wharf or bulk-head, having a mere easement in the nature of wharfage in respect to the land under water in front thereof, to prevent the erection of a pier or wharf by an adjoining owner under the sanction of public authority. *Taylor* v. *Brookman*, 45 Barb. 106; S. C., 1 Abb. (N. S.) 169.

Nor can a person be restrained from making a reasonable improvement on his own premises, upon the ground that it cannot be made without endangering an edifice erected on the adjacent premises, if the owner of the adjacent premises does not possess any special privilege, protecting him from the consequences of such improvement, either by prescription or by grant from the person making the improvement, or from those under whom he claims title. *Lasala* v. *Holbrook*, 4 Paige, 169. And see *Marvin* v. *Brewster Iron Mining Co.*, 55 N. Y. (10 Sick.) 538; S. C., 14 Am. Rep. 322.

§ 8. **Water privileges.** See *ante*, 710, title 2, art. 1, § 14. It is a well-settled principle, that acquiescence for a long time in the infringement of a water right will defeat an otherwise just claim for an injunction. *Wood* v. *Sutcliffe*, 8 Eng. Law & Eq. 217.

ARTICLE II.

PERSONAL PROPERTY.

Section 1. In general. The only ground on which injunctions are granted against third persons in possession of personal property, and ostensibly its rightful owners, upon an *ex parte* application, is for the protection of the fund or property, when shown to be in danger without this interposition. *Thayer* v. *Swift*, Harr. (Mich.) 430.

A court of equity will not interfere by injunction to restrain a defendant from transferring beyond the jurisdiction of the court, bonds, stocks, securities and other equitable assets, where the plaintiff has a full and complete remedy at law, under a judgment, execution and attachment. An attachment is as effectual in preventing a transfer as an injunction, and when the former remedy has been obtained the latter should be denied. *Rogers* v. *Michigan, etc., R. R. Co.*, 28 Barb. 539.

ARTICLE III.

TAKING PRIVATE PROPERTY.

Section 1. Taxes and assessments. See *ante*, 719, title 2, art. 5, § 1. Assessors are *quasi* judicial officers when acting within the sphere of their jurisdiction, and are not subject to an action to review, modify or reverse their judgments, nor to hold them to a personal liability; consequently, an action will not lie for an injunction restraining them from making a proposed assessment. *Western Railroad Company* v. *Nolan*, 48 N. Y. (3 Sick.) 513. Such an injunction would also be denied on the ground that the party aggrieved has an adequate remedy at law, by *certiorari*. Id. And see *Von Beck* v. *Village of Rondout*, 15 Abb. (N. Y.) 48; *Crevier* v. *Mayor, etc., of New York*, 12 Abb. (N. S.) 340.

Nor, as a general rule, can an injunction be sustained by one or more tax payers to prevent the collection of a tax illegally imposed (*Thurston* v. *City of Elmira*, 10 Abb. [N. S.] 119; *Mears* v. *Howarth*, 34 Mich. 19; *Kilbourne* v. *St. John*, 59 N. Y. [14 Sick.] 21; 17 Am. Rep. 291; *Clarke* v. *Ganz*, 21 Minn. 387; *Brown* v. *Concord*, 56 N. H. 375); and, consequently, an injunction cannot be sustained to restrain the probable or possible future imposition of such a tax, which they may become liable to pay by reason of the unauthorized issuing of town bonds for railroad purposes. *Corwin* v. *Campbell*, 45 How.

(N. Y.) 9. Nor will a sale of realty for taxes be restrained because the owner has personalty out of which it might have been collected. *Hallenbeck* v. *Hahn*, 2 Neb. 377. See, also, *Central Pacific R. R. Co.* v. *Corcoran* 48 Cal. 65.

A person lawfully taxed by a municipal corporation cannot set off a debt due him from the corporation against the tax. Nor will equity enjoin the collection of the tax until the debt is paid, nor because of a failure to recover the debt through the ordinary legal remedies, nor because of irregularities in the notice of time and place of sale. *Finnegan* v. *City of Fernandina*, 15 Fla. 379; S. C., 21 Am. Rep. 292.

That land located within a municipal corporation was used for agricultural purposes, and that the owner derived no benefit from the city government, was held to constitute no ground to enjoin the collection of the taxes assessed by the municipal authorities, and, especially, where such owner purchased the property after the corporate limits had been extended so as to cover it. *Linton* v. *Mayor, etc., of Athens*, 53 Ga. 588.

ARTICLE IV.

ROADS, RAILROADS, CANALS, BRIDGES, FERRIES AND WHARVES.

Section 1. Roads. See *ante*, 722, title 2, art. 6. A court of equity will not interfere, by injunction, to prevent a party from applying to the commissioners of highways for a private road over the complainant's land, and the commissioners from laying out such road, the complainant having a complete remedy at law. *Winkler* v. *Winkler*, 40 Ill. 179. Nor will the trustees of a town engaged in laying out a highway be restrained from making an excavation within a certain distance of adjoining land. Such trustees will be left free to act on their responsibility without any other restriction than their sense of duty and the laws of the land. *Flemingsburg* v. *Wilson*, 1 Bush (Ky.), 203.

But legislative acts granting franchises to corporations are to be construed strictly according to their terms, and the grantee in such acts can take no implied rights as against the law-making power, and should not be permitted to encroach by implication upon the rights of individuals who are in no respect parties to the compact between the legislature and such corporation. This principle is specially important in relation to the relative rights of plankroad, ferry and toll-bridge corporations, and those who have rights in adjacent property or claim similar rights and privileges. As an illustration of the application of this principle, it has been held that no injunction can be granted at the

suit of a plankroad corporation to restrain the owner of land lying along such road from opening a road upon his own land and extending on each side of the toll gate, so that the public, by passing over this road, could avoid the payment of toll. *Auburn, etc., Plankroad Co.* v. *Douglass*, 9 N. Y. (5 Seld.) 444.

In general, a property owner cannot invoke the interposition of equity for any omission or irregularities in the proceedings of a municipal corporation to open a street. *Kelsey* v. *King*, 33 How. (N. Y.) 39; affirming S. C., 11 Abb. 180; 32 Barb. 410.

§ 2. **Railroads.** It is held in New York, that a railroad corporation which has completed its road between the *termini* named in its charter, cannot be restrained by a mandatory injunction from ceasing to operate a portion of the road, nor be restrained from selling, taking up or removing the track and fixtures of such portion. But that the remedy in such cases is by *mandamus* or indictment, or, at the election of the State, by proceedings to annul the corporation. *People* v. *Vermont, etc., R. R. Co.*, 24 N. Y. (10 Smith) 261. And see *People* v. *Troy & Boston R. R. Co.*, 37 How. (N. Y.) 427; S. C. affirmed, 6 Alb. Law Jour. 174. But see *Attorney-General* v. *Railroad Companies*, 35 Wis. 425, 548. See *ante*, 723, § 2.

§ 3. **Bridges.** In exercising jurisdiction for the protection of franchises, courts of equity strictly observe the principle, that the right which is the subject of legislative grant, and which it is sought to protect, must be exclusive in its nature. An injunction will not, therefore, be granted at the suit of a company chartered to build and maintain a toll bridge, against another person or corporation constructing a free bridge across the same stream, unless it can be shown that the charter of such company in terms conferred an exclusive right to maintain such bridge. *Fort Plain Bridge Co.* v. *Smith*, 30 N. Y. (3 Tiff.) 44. See, also, title 2, art. 6, § 4; *ante*, 726.

§ 4. **Ferries.** See *ante*, 726, title 2, art. 6, § 5. The principle as to the exclusiveness of the right sought to be protected is also applicable to a ferry franchise. Id. Invasions of a ferry franchise may be restrained by injunction. *McRoberts* v. *Washburne*, 10 Minn. 23; *ante*, 354, 347, 348.

§ 5. **Wharves.** See *ante*, 727, title 2, art. 6, § 6; *Delaware & Hudson Canal Co.* v. *Lawrence*, 2 Hun, 163; S. C. affirmed, 56 N. Y. (11 Sick.) 613. A court of equity will not interpose by injunction to prevent the erection of a wharf in tide-waters, unless it appears that the party petitioning will be materially and substantially injured by such erection. *Thornton* v. *Grant*, 10 R. I. 477; S. C., 14 Am. Rep. 701.

ARTICLE V.

RESTRAINING ACTIONS AND SUITS.

Section 1. Other actions in same court. It is the general rule, that an injunction will not be granted in one action to restrain proceedings in another action in the same court, between the same parties, when relief could have been had in such other action by motion, answer, or decree, *Ely* v. *Lowenstein*, 9 Abb. N. S. (N. Y.) 37. See, also, *Washington* v. *Emery*, 4 Jones' (N. C.) Eq. 29. See *ante*, 179, 180.

§ 2. **Proceedings in foreign courts.** See *ante*, 727, title 2, art. 7, § 3. It is held to be only in a very special case that an action can be maintained in the courts of one State to enjoin and restrain the prosecution of an action commenced and pending in a court of a sister State. *Mead* v. *Merritt*, 2 Paige, 402; *Vail* v. *Knapp*, 49 Barb. 299, 305. And so of actions brought in the courts of the United States. *Schuyler* v. *Pelissier*, 3 Edw. Ch. 191.

§ 3. **Receivers and other officers.** An officer of the court who has obtained authority from it to sue is not only authorized but bound to proceed with his action, and is not to be restrained by injunction out of another court, or by making him a party to a new action and obtaining an injunction against him. The proper method of restraining a receiver when engaged in the discharge of his official trust is by application to the court whose officer he is, for instructions. *Van Rensselaer* v. *Emery*, 9 How (N. Y.) 135; *Winfield* v. *Bacon*, 24 Barb. 154.

§ 4. **Foreclosure of mortgages.** An injunction will not be granted to restrain a mortgagee from foreclosing a mortgage, on the ground of the pendency of an action brought by the mortgagor against the plaintiff in the foreclosure suit for the purpose of declaring the mortgage void and procuring its cancellation. A decision in the prior action would not necessarily determine the rights of the parties, while a decision in the foreclosure suit would settle all issues between the parties. *Torrant* v. *Quackenbos*, 10 How. (N. Y.) 244.

§ 5. **Summary proceedings.** A court of equity will never interfere to restrain a landlord from removing a tenant by summary proceedings, in which the tenant has interposed a legal defense and has been defeated; and an injunction will not be allowed even where the tenant has failed to interpose a defense, unless in a strong case of fraud or surprise, or where the defense was of an equitable nature, not cognizable by the officer. *McIntyre* v. *Hernandez*, 7 Abb. (N. S.) 214; S. C., 39 How. 121. See *Rapp* v. *Williams*, 1 Hun, 716. Nor will an injunction be granted in any case, to one who is not a party to the summary proceed-

iugs, merely because his rightful possession is to be disturbed. *Aaron* v. *Baum*, 4 Abb. (N. S.) 65; S. C., 7 Robt. 340; 37 How. 237.

§ 6. **Staying enforcement of judgment or execution.** As a general rule, a court of equity will not restrain the collection of a judgment which has been obtained without fraud or mistake, upon issue joined and as the result of a vigorous litigation between the parties. The principle upon which this relief is denied is, that the defendant, by neglecting to avail himself of a valid defense at law, has waived his right to relief. *Protheroe* v. *Forman*, 2 Swanst. 227; *Hankey* v. *Vernon*, 2 Cox, 12; *Clute* v. *Potter*, 37 Barb. 199; *Railroad Co.* v. *Neal*, 1 Woods, 353; *Agard* v. *Valencia*, 39 Cal. 292; *Palmer* v. *Malone*, 1 Heisk. (Tenn.) 549; *Franklin Mill Co.* v. *Schmidt*, 50 Ill. 208; *New York, etc., R. R. Co.* v. *Haws*, 56 N. Y. (11 Sick.) 175. But a bill to enjoin a judgment at law is not without equity when it alleges and sets out newly-discovered evidence establishing the fact that, at the date of the trial at law, the judgment debtor was discharged from all liability; that he did not then have the means of proving that fact; and that, although he had used due diligence, he did not know, and had no opportunity of knowing, that such evidence existed. *Cox* v. *Mobile, etc., R. R. Co.*, 44 Ala. 611. See *Garrett* v. *Lynch*, 45 id. 204.

§ 7. **Staying an ecclesiastical decree.** See *ante*, 735, title 2, art. 7, § 9, and *ante*, 179, 180, *Equity*.

§ 8. **Criminal proceedings.** See *ante*, 736, title 2, art. 7, § 11. As a general rule, courts of equity will not interfere to stay proceedings in criminal matters, or in any cases not strictly of a civil nature. *Moses* v. *Mayor, etc., of Mobile*, 52 Ala. 198; *ante*, 180.

ARTICLE VI.

PATENTS, COPYRIGHTS, TRADE-MARKS AND LITERARY PRODUCTIONS.

Section 1. Patents. The courts of a State have no jurisdiction to restrain the infringement of a patent right. The jurisdiction over such cases is vested exclusively in the courts of the United States. *Hovey* v. *Rubber Tip Pencil Co.*, 57 N. Y. (12 Sick.) 119; S. C., 15 Am. Rep. 470. A State court has, however, jurisdiction of an action founded upon a contract, although the validity of a patent may be involved therein. *Middlebrook* v. *Broadbent*, 47 N. Y. (2 Sick.) 443; S. C., 7 Am. Rep. 457; *Rice* v. *Garnhart*, 34 Wis. 453; S. C., 17 Am. Rep. 448. But see *Elmer* v. *Pennel*, 40 Me. 430.

To entitle a patentee to the extraordinary writ of injunction his

right must be substantiated, either: *First*, by a possession accompanied by an actual use and enjoyment of it for a sufficient length of time to afford a reasonable presumption of the acquiescence of the public in its validity; or *Second*, by a judgment in his favor in a trial at law. The latter is never necessary when the former exists. But there should be a trial at law in the absence of use and enjoyment. *Brown* v. *Hinkley*, 6 Fish. Pat. Cas. 370; *Weston* v. *White*, 13 Blatchf. (C. C.) 447. And see *ante*, 736, title 2, art. 8, § 1.

The granting of a patent confers the right to bring suits thereon for its infringement. A defendant ought not, therefore, to be restrained from bringing suits on his patent, before that patent is adjudged to be invalid. *Asbestos Felting Co.* v. *United States, etc., Felting Co.*, 13 Blatchf. (C. C.) 453.

There is no jurisdiction in equity to issue an injunction against a person, falsly representing that the plaintiff's patent infringes upon a patent owned by himself, and thereby deterring others from purchasing the plaintiff's invention. *Whitehead* v. *Kitson*, 119 Mass. 484. See *post*, 770, § 8.

§ 2. **Copyrights.** See *ante*, 738, title 2, art. 8, § 2. A newspaper or price-current is not such a publication as falls under the protection of the copyright law. *Clayton* v. *Stone*, 2 Paine, 382.

§ 3. **Trade-marks.** An injunction will not be granted to restrain a manufacturer from stamping his name in any particular manner on the goods he manufactures, although another person of the same name, and a manufacturer of the same kind of goods, claims the exclusive right to the use of the name as a trade-mark. *Faber* v. *Faber*, 3 Abb. (N. S.) 115; S. C., 49 Barb. 357; *Meneely* v. *Meneely*, 62 N. Y. (17 Sick.) 427; S. C., 20 Am. Rep. 489; *Meriden Britannia Co.* v. *Parker*, 39 Conn. 450; 12 Am. Rep. 401. And where the words claimed as a trade-mark have been long in common use, as applicable to similar articles, no exclusive right to the use of such words can be acquired. *Amoskeag Manuf. Co.* v. *Spear*, 2 Sandf. (N. Y.) 599; *Same* v. *Garner*, 55 Barb. 151; S. C., 6 Abb. (N. S.) 265. Nor will an injunction be granted in favor of a plaintiff who has no more right to use a trade-mark than has the defendant to restrain the latter from manufacturing and selling under such trade-mark an article different from that represented by it, although such defendant does not know the secret of the manufacture of the genuine article. *Weston* v. *Ketcham*, 7 Jones & Sp. (N. Y.) 54. And a court of equity will not interfere to protect a party in the use of trade-marks calculated to deceive the public. *Hobbs* v. *Francias*, 19 How. (N. Y.) 567; *Leather Cloth Company* v. *American Leather Cloth Company*, 11 H. L. Cas. 523.

But this rule does not extend to cases where the deception alleged is not in the trade-mark itself, but in advertisements used to advance the sales of the article. *Curtis* v. *Bryan*, 2 Daly (N. Y.), 312; S. C., 36 How. 33.

And the principle upon which equity enjoins a defendant from imitating the plaintiff's trade-marks are not applied to the publication of newspapers, except so far as to protect the proprietor of a paper in the use of the name adopted by him for such paper. *Stephens* v. *DeCouto*, 7 Robt. (N. Y.) 343; S. C., 4 Abb. (N. S.) 47.

A party is not entitled to an injunction to protect him against another person who has assumed the same label, as to a medicine or drug claimed to have been invented by the complainant, unless his right is clear. And if they were concerned in getting up the medicine, both contributing to the compound as a partnership affair, neither can claim the exclusive right. In such a case the parties will be left to their legal remedies. *Coffeen* v. *Brunton*, 5 McLean (C. C.), 256. See *Brown* v. *Mercer*, 5 Jones & Sp. (N. Y.) 265.

And a court of equity ought not to interfere by injunction to restrain the use of a trade-mark where the testimony in regard to the right to the ownership of such trade-mark is conflicting and contradictory, so that it is difficult to determine on which side the weight of evidence preponderates. *Witthaus* v. *Mattfeldt*, 44 Md. 303.

§ 4. **Literary productions.** See *ante*, 743, title 2, art. 8, § 4. The law favors literature and art, and while it seeks to protect all in the enjoyment of their property and their rights, it does not limit and abridge the field of occupation and enterprise. Thus, it has been held that the use of the word "charity," as a designation of a work of art or of literature, cannot ordinarily be monopolized by one person; and a court will not interfere to prevent its use by another party, unless it be in a case where it is used in bad faith, or to promote some imposition or inflict some wrong. *Isaacs* v. *Daly*, 7 Jones & Sp. (N. Y.) 511.

§ 5. **Secrets of trade.** See *ante*, 752, title 2, art. 9, § 6. Where in a covenant to keep secret the principles of a particular invention, the parties fix the amount of damages therein at a specified sum, the party complaining of a breach of the covenant cannot have an injunction restraining the other party from disclosing the secret. The damages being settled and liquidated in the covenant, the party must be left to pursue his remedy by action upon the covenant for the damages. *Nessle* v. *Reese*, 29 How. (N. Y.) 382; S. C., 19 Abb. 240. See, also, *Deming* v. *Chapman*, 11 How. 382; *Newbury* v. *James*, 2 Mer. 445.

§ 6. **Restraint of trade.** As a general rule, an injunction will not be granted to restrain the reasonable use of a lawful trade in a con-

venient and proper place, even though some one may suffer annoyance from its being carried on; and where a street in a city ceases to be used or occupied as a place of residence, and is changed into a place of business, no one or two persons, who may continue to reside therein, will be allowed to restrain the carrying on of a lawful business, merely because they may suffer loss or inconvenience thereby. *Doellner* v. *Tynan*, 38 How. (N. Y.) 176. And see *Hole* v. *Barlow*, 4 C. B. (N. S.) 334; *Ray* v. *Lynes*, 10 Ala. 63; *Pottstown Gas Co.* v. *Murphy*, 39 Penn. St. 257.

So, covenants in restraint of trade, generally, are void; and in such case, an injunction to restrain any act forbidden by the covenant will not be granted. *Nobles* v. *Bates*, 7 Cow. 307. And see *Caswell* v. *Gibbs*, 33 Mich. 331; *Drake* v. *Dodsworth*, 4 Kan. 159. But a covenant not to exercise a trade or profession for a limited time, and at a particular place, or within a reasonable territory, is good, if founded upon a good consideration, and the covenant will be enforced. *Ewing* v. *Johnson*, 34 How. (N. Y.) 202. Thus, it has been held that an agreement for a valuable consideration, not to practice medicine within twelve miles of a particular locality, is not unreasonable, and that an injunction will be granted to restrain a breach thereof. *McClurg's Appeal*, 58 Penn. St. 51. And where a person, under an agreement not to carry on a specified business, under color of another name, engages in a business which is within the spirit of the agreement, he will be restrained from continuing it. *Richardson* v. *Peacock*, 26 N. J. Eq. 40. See *Turner* v. *Evans*, 2 DeG., M. & G. 740; *Bird* v. *Lake*, 1 Hem. & M. 338; *Dales* v. *Weber*, 18 W. R. 993; *Clark* v. *Watkins*, 9 Jur. (N. S.) 142. But in no case will an injunction be granted to restrain a defendant from exercising or carrying on a certain trade or profession where the covenant or agreement names a sum as a penalty for a breach. *Vincent* v. *King*, 13 How. (N. Y.) 234; *Hahn* v. *Concordia Society*, 42 Md. 460. And when damages will compensate the benefit derived or the loss suffered, equity will not interfere by injunction. *Harkinson's Appeal*, 78 Penn. St. 196; 21 Am. Rep. 9.

And where the breach alleged was the violation of a contract that the defendant would not engage, in the same town, in a similar business to the one sold to the plaintiff, it was held that the petition should aver a *continuing and present* engagement in the business, to entitle him to an injunction. *Berger* v. *Armstrong*, 41 Iowa, 447. See *Spicer* v. *Hoop*, 51 Ind. 365.

§ 7. **Editor and publisher.** The name of an editor appearing on the title page forms no part of the title of a paper or journal. An injunction will not therefore be granted to restrain the publication of a

paper or journal by the proprietors, on the ground that the name of the editor was omitted, even where, by express stipulation between the parties, it was agreed that the title should not be changed or altered except by mutual consent. *Crookes* v. *Petter*, 6 Jur. (N. S.) 1131. Nor will the proprietors of a paper be restrained from changing or altering the articles contributed by the editor, or from publishing other articles therein not contributed by him, but he will be left to seek his remedy in damages in an action at law. Id.

§ 8. **Libelous publication.** The jurisdiction of a court of equity does not extend to cases of libel or slander, or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involve no breach of trust or of contract. *Boston Diatite Co.* v. *Florence Manuf. Co.*, 114 Mass. 69; S. C., 19 Am. Rep. 310; *Whitehead* v. *Kitson*, 119 Mass. 484; *Mulkern* v. *Ward*, L. R., 13 Eq. 619; *Brandreth* v. *Lance*, 8 Paige, 24; *Singer Manf. Co.* v. *Domestic Sewing Machine Co.*, 49 Ga. 70; S. C., 15 Am. Rep. 674. An injunction will not, therefore, be granted to restrain the publication of a libel as such, even if it is injurious to property. *Prudential Assurance Co.* v. *Knott*, L. R., 10 Ch. App. 142; S. C., 11 Eng. R. 498; overruling *Dixon* v. *Holden*, L. R., 7 Eq. 488; *Springhead Spinning Co.* v. *Riley*, 6 id. 551. Equity refuses its aid in such case upon the ground that an adequate remedy may be had in a court of law, either in the form of a civil suit, or by criminal proceedings. *Wren* v. *Weild*, L. R., 4 Q. B. 730; *Like* v. *McKinstry*, 41 Barb. 186; S. C. affirmed, 3 Abb. Ct. App. 62; 4 Keyes, 397; *Clark* v. *Freeman*, 11 Beav. 112.

§ 9. **Immorality of works.** A court of equity may refuse to protect a work because of its immorality, where an injunction might otherwise be granted. And, as a general rule, equity will not interfere if the publication sought to be restrained is a printed edition of a work clearly irreligious, immoral, libelous or obscene. *Walcot* v. *Walker*, 7 Ves. 1. The court does not act in such cases as a public censor, but refuses to protect that in which the law has denied any right of property. *Burnett* v. *Chetwood*, 2 Mer. 441, note; *Fores* v. *Johnes*, 4 Esp. 97.

ARTICLE VII.

PERSONAL RIGHTS OR PECULIAR RELATIONS.

Section 1. Partners. See *ante*, 745, title 2, art. 9, § 1. An injunction will not in general be granted, and a receiver of the partnership property appointed, except in cases where the plaintiff will be entitled to a decree of dissolution. *Henn* v. *Walsh*, 2 Edw. Ch. 129.

And it is held that an injunction will not be allowed to restrain the sale of the interest of one partner in copartnership property, on judgment and execution against such partner to recover a debt due from him individually, where it is not made to appear that the partner had no interest which the creditor should be allowed to reach by a sale on his execution. *Mowbray* v. *Lawrence*, 22 How. (N. Y.) 107; S. C., 13 Abb. 317; *Turner* v. *Smith*, 1 Abb. (N. S.) 304.

Where a copartnership is dissolved and no agreement is entered into between the parties in regard to the good will, nor any restriction from going into the same business, or from using the former firm name, one of the former partners will not be restrained at the suit of the other from using the name of the old firm where it properly designates also the name and style of his new firm. *Lathrop* v. *Lathrop*, 47 How. (N. Y.) 532.

§ 2. **Corporations.** See *ante*, 747, title 2, art. 9, § 2. All corporations capable of taking and holding property have the "*jus disponendi*" as fully as natural persons, except so far as they are restrained by law. *State* v. *College of California*, 38 Cal. 166. An injunction cannot, therefore, properly be granted at the suit of a stockholder to restrain a business corporation in respect to the general management of its corporate property or the investment of its surplus moneys, unless in the case of a clear violation of express law, or a wide departure from chartered powers. *Bach* v. *Pacific Mail Steamship Co.*, 12 Abb. (N. S.) 373. See, also, *Baltimore, etc., R. R. Co.* v. *City of Wheeling*, 13 Gratt. (Va.) 40; *Hodges* v. *New England Screw Co.*, 3 R. I. 3; *Lord* v. *Governor & Company of Copper Mines*, 2 Phill. Ch. 740. Nor can an injunction to restrain a corporation from reducing its capital stock in a mode authorized by law be sustained at the suit of a stockholder, on the ground that his individual liability for the debts of the corporation will be thereby increased, upon his mere apprehension unsustained by any proof that it may become unable to pay its debts. *Joslyn* v. *Pacific Mail Steamship Co.*, 12 Abb. (N. S.) 329. And a doubt as to the authority of a corporation to do an act is fatal to an application for an injunction to restrain such act on the ground of want of authority. *Att.-Gen.* v. *Delaware, etc., R. R. Co.*, 27 N. J. Eq. 1.

The legislation of a municipal corporation is not subject to restraint by injunction. *People* v. *Mayor, etc., of New York*, 9 Abb. 253; S. C., 10 id. 144; 19 How. 155; 32 Barb. 35. Nor can an injunction issue to restrain any act which is within the discretion of a municipal corporation. *McCafferty* v. *Glazier*, 10 How. 475; S. C., 4 Abb. 57; *Cleveland Fire Alarm Co.* v. *Metropolitan Fire Commissioners*, 7 Abb. (N. S.) 49; S. C., 55 Barb. 288; *Semmes* v. *Columbus*, 19 Ga.

471. So, in cases where the public health is concerned, no application for an injunction will be entertained to restrain the execution of a contract tending to its preservation, whatever may be the legal rights of the parties. *Kelsey* v. *King*, 32 Barb. 410; S. C. affirmed, 33 How. 39; *Dry Dock, etc., Co.* v. *Mayor, etc., of New York*, 55 Barb. 298. And see *Hine* v. *City of New Haven*, 40 Conn. 478. The increased risk of fire and consequent danger to adjoining property from the erection of a wooden building in a thickly settled portion of a village does not warrant a court of equity in interfering by injunction to restrain the erection. *St. John* v. *McFarlan*, 33 Mich. 72; S. C., 20 Am. Rep. 671. See *post*, title *Municipal Corporations*.

§ 3. **Public officers.** See *ante*, 749, title 2, art. 9, § 3. In no case will a court of equity, during the pendency of a legal action to try the rights of parties to a public office, practically oust the incumbent by an injunction restraining him from exercising the duties of the office pending the litigation. *People* v. *Mattier*, 2 Abb. (N. S.) 289. See, also, *State* v. *Jarrett*, 17 Md. 309. And the same reasons which forbid the issuing of an injunction in such a case apply in the case of a litigation as to officers of corporations. *People* v. *Conklin*, 5 Hun, 452; *Mozley* v. *Alston*, 1 Phill. Ch. 790. In all such cases the court is governed by the principle that it is better that an officer *de facto* should discharge the duties of an office than that they should not be discharged at all. *People* v. *Mattier*, 2 Abb. (N. S.) 289. See, also, *State* v. *Wolfenden*, 74 N. C. 103.

But in Pennsylvania either of two conflicting bodies of men, claiming to hold one and the same office at one and the same time, may apply to the supreme court for an injunction to restrain the other from usurpation of powers to which it is not entitled. *Kerr* v. *Trego*, 47 Penn. St. 292.

An injunction will not issue for the purpose of restraining a judicial officer from transcending his jurisdiction (*McIntyre* v. *Hernandez*, 39 How. 121; S. C., 7 Abb. [N. S.] 214. And see *Justices* v. *Croft*, 18 Ga. 473; *Vitt* v. *Owens*, 42 Mo. 512; *People* v. *Coffin*, 7 Hun [N. Y.], 608); nor to restrain the acts of police officers in the exercise of their duty. *Sterman* v. *Kennedy*, 15 Abb. 201. See, also, *Davis* v. *Society for Prevention of Cruelty*, 16 Abb. (N. S.) 73; *Prendorill* v. *Kennedy*, 34 How. 416.

An injunction restraining the authorities of a State from taking private property for public use, on the ground that the compensation to be allowed is inadequate, cannot be maintained, for the reason that the legislature is the proper authority to grant relief in such cases. *Heston* v. *Longstreth*, 1 Phil. (Penn.) 25.

§ 4. **Attorneys and counsel.** See *ante*, 752, title 2, art. 9, § 6. An attorney cannot be restrained in the mere performance of his duty to his client. And where it is sought to restrain proceedings at law, it is improper to enjoin the counsel employed in those proceedings, unless something more is alleged against him than the prosecution of his client's rights. *Mayor, etc., of New York* v. *Conover*, 5 Abb. (N. Y.) 252.

§ 5. **Removal of dead.** An injunction will not be allowed to restrain church officers from selling a vault granted by the church for burial purposes, or from destroying the vault, or from removing the dead, or otherwise interfering with the use of the vault, where circumstances require that the church property shall be abandoned to the public use. *Richards* v. *Northwest Dutch Church*, 32 Barb. 42; S. C., 20 How. 317; 11 Abb. 30; *Rousseau* v. *City of Troy*, 49 How. 492; *Van Horn* v. *Talmage*, 4 Halst. (N. J.) Ch. 108. See Vol. 2, *Cemeteries*.

ARTICLE VIII.

PERFORMANCE OF CONTRACTS.

Section 1. Personal services. See *ante*, 754, title 2, art. 10, § 1. As a general rule, an injunction will not be allowed to restrain a covenanting party from the rendition of personal services to others, in violation of his agreement, where the services to be rendered are of a physical nature as distinguished from those of a purely intellectual character. *Kemble* v. *Kean*, 6 Sim. 333; *Lumley* v. *Wagner*, 1 DeG., M. & G. 604; *De Pol* v. *Sohlke*, 7 Robt. (N. Y.) 280.

§ 2. **Illegal contracts in general.** It is a general rule, that an injunction will not be granted where the only claim for relief is founded upon a contract which is upon its face illegal. *Bennett* v. *American Art Union*, 10 N. Y. Leg. Obs. 132; S. C., 5 Sandf. 614.

§ 3. **Usury.** The general rule is, that where the defendant at law fails to urge the defense of usury, a court of equity will not entertain jurisdiction to grant him relief by an injunction. *Lansing* v. *Eddy*, 1 Johns. Ch. 49; *Morgan* v. *England*, Wright (Ohio), 112; *Buchanan* v. *Nolin*, 3 Humph. (Tenn.) 63. But where there is embarrassment and difficulty in the remedy at law in consequence of the number of usurious securities and number of contracts, and the complex nature of the transactions, or where the suits at law and judgments are to be regarded as usurious securities constituting a portion of the devices resorted to to conceal and secure the usury, in all such cases equity will give relief. *Frierson* v. *Moody*, 3 id. 561; *Lindsley* v. *James*, 3 Coldw. (Tenn.) 477.

§ 4. **Sailing of a vessel.** Where a controversy exists among the owners of a vessel an injunction will not be granted to enjoin the sailing of the vessel in accordance with the will of the majority of the owners. *Furniss* v. *Brown*, 8 How. (N. Y.) 59. See *Marshall* v. *McGregor*, 59 Barb. 519.

ARTICLE IX.

FRAUD.

Section 1. In general. Relief in equity will not be granted on the ground of fraud, unless the bill alleges specific and definite acts of fraud. *Patton* v. *Taylor*, 7 How. (U. S.) 132. And see *ante*, 755, title 2, art. 11, § 1. And this is so, even where a statute authorizes the interference of equity restraining fraudulent assignments of a debtor's property in derogation of the rights of creditors before judgment. *Laupheimer* v. *Rosenbaum*, 25 Md. 219. And mere allegations that the complainant *fears* and *believes* that it is the purpose of the defendant to perpetrate a fraud upon him, by placing his effects beyond the reach of his creditors, are insufficient to authorize the granting of an injunction *Hubbard* v. *Hubbard*, 14 Md. 356. But an allegation that the property of a debtor is beyond the reach of legal process by his creditor, is held to be as effective in the way of inducing a court of equity to exercise its extraordinary restraining power as an allegation of insolvency could be. *Conolly* v. *Riley*, 25 id. 402.

One who purchases land subject to the lien of a judgment obtained by fraud against his grantor, is not entitled to enjoin a sale of the land under the judgment, unless he shows affirmatively that he will be injured by such sale. *Marriner* v. *Smith*, 27 Cal. 650.

ARTICLE X.

ACCIDENT AND MISTAKE.

Section 1. In general. See *ante*, 756, title 2, art. 12, § 1. The specific performance of an agreement, which through undenied accident and mistake, did not express the *intent* of the parties executing it, will not be enforced in a court of equity. *Morganthau* v. *White*, 1 Sweeny (N. Y.), 395. And see *Matthews* v. *Terwilliger*, 3 Barb. 50; *Watts* v. *Cummins*, 59 Penn. St. 84; *Spurr* v. *Benedict*, 99 Mass. 463; *Freeman* v. *Curtis*, 51 Me. 140; *Cooper* v. *Phibbs*, L. R., 2 H. L. Cas. 149.

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